Supreme Court of the United States

OCTOBER TERM, 1968

No. 750

GLENN MARTIN HARRINGTON, *Petitioner,*

—v.—

CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

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Nº 298977.

THE PEOPLE OF THE STATE OF CALIFORNIA VS.	MUNICIPAL COURT	SUPERIOR COURT
1. JESSE BOSEY PR.	DIV., San Antonio	ATTY. FOR PEOPLE
2. GILBERT COOPER PR.	NO. F 5597	ATTY. FOR DEFENDANT 1 & 2 J. Rosen; 3 & 4 R. Walton; 4 also R. Walton
3. GLEN MARTIN HARRINGTON 2 PR.	BAIL FIXED AT No bail as to 2	
4. GEORGE PHONE PR.	DATE OF CRIME Dec 11 64	JUDGE
CHARGE 100 Murd 187		

DATE	DEPT.	COMPLAINT / WARRANT / SUBPOENA	REPORTER
JAN 14 1965		ARRAIGNMENT DATE SET FOR Jan 27 65	Sheriff
JAN 25 1965 JAN 27 1965		TRANSCRIPT AND 4 COPIES FILED Jon M Rosen 2/9/65	
JAN 14 1965		INFORMATION FILED	
		EXHIBITS FILED 286454 & PH	
100 JAN 27 1965		#1 - aust Feb 2, 9a	Rem
		#2, 3, 4 R Appld - aust - Plea Feb 2, 9a	Rem Brumbaugh
100 FEB 2 - 1965		#4 - aust to Feb 8, 9a	Rem
		#2 - Plea nlg & 3/24, 9a D107	Rem
		#3 & 4 - Ptn filed by R. Walton Appt Pub Def 987a PC - plea Feb 8, 9a	Rem
100 FEB 8 - 1965		#1 - Jon Rosen appt pub def 987a PC - plea Feb 11, 9a	Rem
		#3 - Plea nlg - demurrer - to Mar 24, 9a D107	Rem
		#4 - R. Walton relieved & W. Gordon appt pub def 987a PC - plea nlg - to Mar 24, 9a D107	Rem
100 FEB 11 1965		#1 - Plea nlg - to Mar 24, 9a D107	Rem
3-24-65	107	Eq: Cont May 14, 1965, 9am for Trial	Weber
4-2-65	107	#3 Adv from pro. per. to - Dept's req. to appt. Counsel und. 987a PC denies Court Prays	"
4-8-65	107	Harrington: Req to Law Library pris. den	"
4-30-65	107	Eq: Plea Feb 11 to - Not to plead den - Retired to Trial call May 10 9am	Rem
5-4-65		#3 Petn for cert order filed Sent to D107	"
5-7-65	107	#3 Petition denied	"
5-10-65	107	Eq: Cont'd to June 14 65 9am	Rem
6-14-65	107	Eq: Trans to Dept 110	"
6/14/65	110	Each: On Trial - Jury - Cont'd June 15, 9½ Rem	Weber
6/15/65	110	Each: On Trial - Jury - Cont'd June 16, 9am Rem	"
6/16/65	110	Each: On Trial - Jury Cont'd June 17, 9½ Rem	"
6-17-65	110	Each: On Trial - Jury Cont to June 21, 1965 9½ Rem	"
6-21-65	110	Each: On Trial - Jury - Cont to June 22, 1965 9½ Rem	"
6-22-65	110	Each: On Trial - Jury - Cont to June 23 1965 10am Rem	"
6-23-65	110	Each: On Trial - Jury - Cont to June 24 1965 9½ Rem	"
6-24-65	110	Each: On Trial - Jury - Cont to June 25 1965 9½ Rem	"
6-25-65	110	Each: On Trial Jury - Cont to June 28, 1965 9½ Rem	"
6-28-65	110	Each: Case Resumed from June 25 - Arguments & Instr completed. Jury retires to Deliberate - Remanded	"
6-29-65	110	Each: On Trial Jury continues to Deliberate - Rem	"
6-30-65	110	Each: Jury finds Defts guilty Murder first degree. Penalty same Cont'd to July 1, at 1½ Pm - Rem	"

298977

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
Booby et al
PR.
PR.
PR.
PR.
CHARGE

MUNICIPAL COURT
DIV.
NO.
BAIL FIXED AT
$
DATE OF CRIME

SUPERIOR COURT
ATTY. FOR PEOPLE
ATTY. FOR DEFENDANT #1 J. Rosen
2 PD J. Moore
3 R. Walton
4 W. Gordon
JUDGE

	DEPT.	COMPLAINT / WARRANT / SUBPOENA	REPORTER
		ARRAIGNMENT DATE SET FOR	
		TRANSCRIPT AND ____ COPIES FILED	
		INFORMATION FILED	
		EXHIBITS FILED	
7-1-65	110	Penalty trial Jury recesses to July 2, 9 a.m. — Rosen	Walther
7-2-65	110	Penalty Trial Jury recess to July 6, 9 a.m. — Rosen	"
7-6-65	110	Penalty Trial Jury — Each Deft = Imprs in State Prison for Life — Prob Report ordered — P+S cont'd 7/28 9 a.m. — Rosen	"
7/14		Clinard Cooper — Notice of appeal filed	
7-28-65	110	Ea: Defts pending motion for new trial is denied. Court sentences each Deft to imprisonment in the State Prison for Life. Defts remanded	Van Fleet
8-4-65	110	Order Warrant drawn by Judge to pay atty — Deft #1	Walther
		" " " " " " " " #3	"
		" " " " " " " " #4	"
8/6/65		Booby — Notice of appeal filed. Hardgrave " " " "	
8-12-65	110	MO of 7/6/65 corrected to show Pet's exhs 16 or 17 marked for ID are ordered by reference only	"
9-16-65	110	Deft Gilbert Cooper's request for all records and transcripts to be sent to Chicago is denied	"
JAN 22 1968		REMITTITUR FILED w/OPINION. Judgments are affirmed	

THIS DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE OF RECORD IN MY OFFICE
ATTEST ____ 19__
WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California, for the County of Los Angeles
BY ____ DEPUTY

TYP 248 1-68

8

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

S. C. No. 298977
D. A. No. 367086

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

JESSE BOSBY, GILBERT COOPER, GLEN MARTIN HARRINGTON and GEORGE RHONE, JR., DEFENDANTS

INFORMATION

Murder (Sec. 187, P.C.)

The said JESSE BOSBY, GILBERT COOPER, GLEN MARTIN HARRINGTON, and GEORGE RHONE, JR. are accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of MURDER, in Violation of Section 187, Penal Code, a felony, committed as follows: That the said JESSE BOSBY, GILBERT COOPER, GLEN MARTIN HARRINGTON, and GEORGE RHONE, JR. on or about the 11th day of December, 1964 at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously and with malice aforethought murder Benjamin G. Serna, a human being.

EVELLE J. YOUNGER
District Attorney for the
County of Los Angeles,
State of California

By /s/ P. deDubovay
P. DEDUBOVAY
Deputy

4

Filed in open Superior Court of the State of California, County of Los Angeles, on motion of the District Attorney of said County.

DATED: Jan. 27, 1965

WILLIAM G. SHARP
Clerk

By JUAN N. VELASCO
Deputy

rw

That before the commission of the offense hereinbefore set forth in this information, said defendant, GLEN MARTIN HARRINGTON ufider the name of Glenn Harrington, was in the Superior Court of the State of California, for the County of Sacramento, convicted of the crime of ROBBERY, a felony, and the judgment of said court against said defendant in said connection was on or about the 24th day of February, 1958, pronounced and rendered and said defendant served a term of imprisonment therefor in the State Prison.

That before the commission of the offense hereinbefore set forth in this information, said defendant, GLEN MARTIN HARRINGTON, was in the Long Beach Judicial District, County of Los Angeles, State of California, convicted of the crime of BURGLARY, a felony, and the judgment of said court against said defendant in said connection was on or about the 6th day of November, 1963, pronounced and rendered and said defendant served a term of imprisonment therefor in the State Prison.

jbs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 100
Jan. 27, 1965

Present HON. DAVID W. WILLIAMS, Judge

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

As to each Defendant: Deputy District Attorney James Johnson, and the Defendant, present. Deputy Public Defender W. Rasmussen, is appointed; arraigned and plea continued to date shown at 9 A.M., at request of the defendant.

Remanded

Defendant		Date of Plea
298928	JENNIE C DAMIANI	Feb 2, 1965
298932	RICHARD ELRO WHITSELL	Feb 2, 1965
298933	DARLIS JOAN ERWIG	Feb 2, 1965
298934	ALVIN CROCKETT	Feb 2, 1965
298935	WILLIAM LEROY STEWART	Feb 2, 1965
298937	MARSHALL DAVOUST SAXON	Feb 2, 1965
298940	WILLIE WRIGHT and	Feb 2, 1965
	QUIETEN C VICKERS	Feb 2, 1965
298944	GARLAND HUGHES	Feb 2, 1965
298947	WILLIE LEE HURLEY	Feb 2, 1965
298948	CHARLES DAVIS	Feb 2, 1965
299006	SAMMIE LEE DAVIS	Feb 2, 1965
298974	WILLIAM FREDERICK PIPER	Feb 2, 1965
298975	BOB WARREN STONE and	Feb 2, 1965
	ROBERT DWANE GRAHAM	Feb 2, 1965
298977	GILBERT COOPER	Feb 2, 1965
	GLEN MARTIN HARRINGTON and	Feb 2, 1965
	GEORGE RHONE	Feb 2, 1965

Bail

298557	LARRY CATO	Feb 2, 1965
298640	ROSE UNDERWOOD	Feb 2, 1965
298929	JUAN O ALVAREZ	Feb 2, 1965
298930	HERMAN BAKER	Feb 2, 1965

Defendant		Date of Plea
299006	CHARLES EDWARD FINCH	Feb 2, 1965
298976	FRANK JAMES PETRONE JR	Feb 2, 1965

Remain on own recognizance

298934	BERTRAND MITCHELL MOORE	Feb 2, 1965
298938	CLYDE A HALEY	Feb 2, 1965
298985	THOMAS PETER ERICKSON	Feb 2, 1965
298986	THOMAS PETER ERICKSON	Feb 2, 1965
298989	JEREMIAH E ROBESON	Feb 2, 1965

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 100
Feb. 8, 1965

Present Hon. David W. Williams, Judge

298977

The People of the State of California

vs.

Glen Martin Harrington

Deputy District Attorney James Johnson and Defendant with counsel, R. Walton, present. Pleads "Not Guilty", denies priors. Trial set for March 24, 1965 at 9 A.M. in Department 107. Remanded.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 107
Mar. 24, 1965

Present HON. MARK BRANDLER, Judge

298977

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

JESSE BOSBY, GILBERT COOPER,
GLEN MARTIN HARRINGTON and GEORGE RHONE

Each: Deputy District Attorney A Warnberg; Defendant Jesse Bosby with counsel, J Rosen; Defendant Gilbert Cooper with counsel, Deputy Public Defender J Moore; Defendant Glen Martin Harrington with counsel, R Walton and Defendant George Rhone with counsel, W Gordon by P Carter, present. On motion of all defense counsel, for additional preparation; cause continued to May 10, 1965, 9 AM, pursuant to Section 1382 Penal Code, good cause shown; (Defendant Gilbert Cooper objects). Bosby, Harrington and Rhone: Time waived. Each: Remanded.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 107
Apr. 8, 1965

Present HON. MARK BRANDLER, Judge

298977

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

GLEN MARTIN HARRINGTON

Letter received from defendant request for law library privileges to prepare a Supreme Court appeal in another case, is denied. County Clerk to send copy of this order to defendant in Los Angeles County Jail.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. 298977

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

—*v*—

JESSE BOSBY, GILBERT COOPER, GLENN MARTIN HARRINGTON and GEORGE RHONE, JR., DEFENDANTS

NOTICE OF MOTION FOR SEVERANCE OF TRIAL; MEMORANDUM OF FACTS AND LAW IN SUPPORT THEREOF

To the People of the State of California and to their attorney of record herein, Evelle J. Younger, District Attorney of the County of Los Angeles:

YOU WILL PLEASE TAKE NOTICE that on the 30th day of April, 1965, at the hour of 9 o'clock AM, or as soon thereafter as counsel can be heard, in Department 107 of the above-entitled court, situated in Room 832 of the Hall of Justice, defendant Glenn Martin Harrington will move the court for an order granting him a trial separate from that of the co-defendants above-designated.

Said motion will be based upon the testimony of Charles William Vaughn, given at the preliminary hearing had in connection with the above-entitled cause, a transcript of which has been marked Exhibit "A" and filed concurrently herewith, upon the memorandum of facts and law which is filed as a part of this notice of motion; upon all the papers, pleadings, documents and records on file herein; and upon this notice of motion.

Dated: April 16, 1965, at Los Angeles, California.

DAHLSTRUM AND WALTON

By: /s/ Richard A. Walton
Attorneys for Defendant
GLENN MARTIN HARRINGTON

The court's file will reflect that the moving defendant is charged in a one-count information with the crime of murder in violation of Section 187, Penal Code. The theory of the prosecution's case is that the homicide was committed in the course of an armed robbery, which fact, if proved, would subject the moving defendant to the possibility of conviction of murder in the first degree pursuant to Section 189, Penal Code.

Upon the preliminary hearing, held jointly for all four defendants, Sheriff's Sgt. Charles William Vaughn testified to statements made by all defendants except the moving defendant. Said statements have the tendency to incriminate the moving defendant as follows:

Gilbert Cooper said the "white man" was armed. (See Exhibit "A" 82:25-83:2) The moving defendant is the only white man among the defendants.

George Rhone, Jr., said the moving defendant pulled a gun and that he, Rhone, took it from him out of fear he would start shooting. (See Exhibit "A" 89:3-6)

Jesse Bosby said the moving defendant helped dispose of the death weapon. (See Exhibit "A" 93:4-8)

No statement of any kind was made by the moving defendant.

The beginning point for any discussion of a defendant's entitlement to a separate trial is the following legislative enactment:

> "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial."
>
> *Section 1098, Penal Code.*

There can be no question but that a motion such as the one now before the court may be granted or denied in the exercise of the court's discretion. The very language of the statute so states. And a defendant's prospects on an appeal from the denial of a motion for severance are bleak if anything. Thus, the trial judge should scrutinize with care any such motion. His decision is apt to be the binding one. To attempt to show an abuse of discretion on the part of the judge who denies such a motion is to undertake the nigh impossible, at least on the present state of the law.

This is not to say, however, that some high courts have not been troubled by problems such as the one now posed.

> "Thoughtful judicial opinions have voiced misgivings as to jurors' inability to segregate evidence into separate intellectual boxes, each containing a single defendant."
>
> *People* v. *Chambers, 231 ACA 41*

The Chambers court more recently reversed a judgment of conviction partly on the ground that it was unlikely that the jury was able to heed the limiting instruction that the extrajudicial statements of one defendant could be considered only against him and not against his codefendant.

People v. *Perez, 231 ACA 738* (Hearing granted)

Fortunately or unfortunately, jurors are human. The Chambers case and the vacated Perez opinion merely recognized what every criminal lawyer knows or suspects. Another recent case, in which a judgment of conviction was reversed in part because of the implication of some defendants by the statement of a confessing defendant, stated the problem this way:

> "It was too much to expect of jurors that they could put out of their minds the great mass of evidence which led so directly to the conclusion that the defendants were all evil and criminally inclined."
>
> *People* v. *Biehler, 198 CalApp2d 290*

But perhaps the most eloquent of all expositions of the problem is that of the late Mr. Justice Frankfurter in a brief dissenting opinion joined in by Mr. Justices Black, Douglas and Brennan:

> ". . . The dilemma is usually resolved by admitting such evidence against the declarant but cautioning the jury against its use in determining the guilt of the others. The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell . . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds. After all, the prosecution could use the confession against the confessor and at the same time avoid such weighty unfairness against a defendant who cannot be charged with the declaration by not trying all the co-conspirators in a single trial . . . It is no answer to suggest that here the petitioner-defendant's guilt is amply demonstrated by the uninfected testimony against him. That is the best of reasons for trying him freed from the inevitable unfairness of being affected by testimony not admissible against him . . ."

Delli Paoli v. *United States*, *352 U.S. 232*

Admittedly the cases are virtually non-existent in which a trial judge has been held to have abused his discretion in denying severance, but that is all the more reason for the trial judge to gather unto himself the aura of a court of last resort.

> ". . . the exercise of discretion means that the decision must be based upon a just and proper considera-

tion of the particular circumstances which are presented to the court in each case."

People v. *Eudy, 12 Cal2d 41*

If ever severance is justified, it is justified in the instant case. Of four defendants, three have made incriminating statements which implicate the fourth, who has made no statement at all. How can the trial of the non-confessing defendant be a fair one? How can he escape the inevitable prejudicial impact of three statements that reach out to grasp him? Not the most emphatic admonition, not the most carefully worded instructions, can avoid the certain prejudice that will attach to him.

True, a separate trial will cost money and consume time. But such inconveniences are small when weighed against the need to preserve the concept of fair trial.

CONCLUSION

The motion of Glenn Martin Harrington for a separate trial should be granted.

Respectfully submitted

DAHLSTRUM AND WALTON

By: /s/ Richard A. Walton

EXHIBIT A TO NOTICE OF MOTION FOR SEVERANCE OF TRIAL

IN THE MUNICIPAL COURT
OF SAN ANTONIO JUDICIAL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

HON. S. W. SPIZER, Judge

285745

No. F 5597

Vio. Sec. 187 P.C., a felony

THE PEOPLE OF THE STATE OF CALIFORNIA PLAINTIFF

—*vs*—

JESSE BOSBY, GILBERT COOPER, GLEN MARTIN HARRINGTON and GEORGE RHONE, JR., DEFENDANTS

PRELIMINARY EXAMINATION

January 13, 1965

REPORTER'S TRANSCRIPT

APPEARANCES:

For the People:

PORTER C. DE DUBOVAY, Deputy District Attorney, 600 Hall of Justice, Los Angeles, California

For the Defendant Cooper:

JAMES J. SCHMITT, Deputy Public Defender, 402 Hall of Justice, Los Angeles, California

For the Defendants Bosby, Harrington and Rhone:

(Preliminary Hearing Only)

WILLIAM A. LEEDS, 257 South Spring St., Los Angeles, Calif.

[fol. 75] CHARLES WILLIAM VAUGHN

called as a witness on behalf of the prosecution, being first duly sworn, was examined and testified as follows:

COURT CLERK: Please be seated, state your full name, spelling the last.

A Charles William Vaughn, V-a-u-g-h-n.

DIRECT EXAMINATION

BY MR. deDUBOVAY:

Q Sergeant Vaughn, you are a member of the Los Angeles County Sheriff's Homicide Detail, is that correct?

A Yes, sir.

Q And you are one of the investigating officers in this case?

A Yes, sir, I am.

Q First of all, may I have the guns, Your Honor, People's 2 and 3? Showing you the guns that have been previously marked People's 2 and People's 3, did you recover either of these guns?

A Yes, sir, People's 2 I did.

Q Where did you recover that?

A At the northeast corner of the shipping and receiving department, Gaffers and Sattler's Plant, 4851 South Alameda Street, City of Los Angeles.

Q What date was this?

A December 11th, 1964, at approximately 9:45 p.m.

[fol. 76] Q Would you tell us the circumstances of the recovery of that gun?

A Approximately 9:35 p.m. Sergeant Harold White, Homicide Detail, Sergeant Gerald Riley, Firestone Station, and myself were at that location and while we were at that location conducting the investigation we observed Mr. Cooper walk towards the Security Gate at Gaffers and Sattler and at that time I asked him what his name was. He stated Gilbert Cooper. I asked him if he owned the Mercury that was parked approximately 10 yards from us at that time. He stated yes, that he did.

MR. deDUBOVAY: Your Honor, I hold in my hand a photograph of—I believe it is a '55 or '56 Mercury,

License KCY 482 reflected in one of the photographs. May these be collectively marked as People's next in order?

THE COURT: They will be marked People's 7 and 8 for identification.

MR. deDUBOVAY: 7 is the one that reflects the license number, 8 the side view.

Q Showing you these two photographs of this Mercury automobile, is that the automobile to which you are alluding?

A Yes, People's Exhibit Number 7.

Q People's 7, yes.

A 7. Yes, sir, that is the vehicle that we observed parked adjacent to the Guard Shack at Gaffers and Sat-
[fol. 77] tler's Plant.

Q You say you asked defendant Cooper if that was his car?

A Yes, sir, we did.

Q All right, sir. Then what happened?

A I asked him if he had been driving it all day and he stated yes, he had.

MR. SCHMITT: Your Honor, I make an objection to any conversation, no foundation being laid.

MR. deDUBOVAY: Very well. I will go into the foundation.

Q First of all, to try and speed things up, Sergeant, did you have the information at that time relating to probable cause that has been testified to from this stand?

A Yes, in substance.

Q In substance you had all of that information?

A Yes, sir.

Q Including the license number of the car that was seen leaving the scene of the shooting?

A Yes, sir, I did.

Q All right, sir. At the time you had this conversation that you are just about to relate with defendant Cooper, who was with you, who was present?

A Mr. Cooper, Sergeant Harold White, Sergeant Gerald Riley, and myself.

[fol. 78] Q This is at the time and place you previously testified to?

A That's right.

Q Relate what happened, what was said?

A I asked if he had been driving his vehicle all day. He stated he had. I asked him if anyone else had been using the vehicle and he said no. At that time he stated that he knew why we were at that location. I asked him why. He says regarding the shooting down at the market on Holmes Avenue. At that time I advised him he was under arrest for murder and advised him of his Constitutional Rights.

Q Now, as to the Constitutional Rights, just what did you inform him?

A Either myself or Sergeant White stated that anything he said would be used in court against him, he did not have to converse with us regarding this case, and he had a right to have an attorney present.

Q Now, after advising him of this, what happened?

A He stated that he had the gun that he took from the lady at the market, and I asked him to take us to the location where the gun was at that time. We then proceeded to the middle door of the shipping and receiving department and en route Mr. Cooper stated that he had taken the shells from the gun and threw them out to the laundromat construction site on Colden and either Hooper [fol. 79] or Hoover Streets near his home in Los Angeles, and the gun was unloaded at that time. He directed us to the second wooden pallet from the bottom of a stack of wooden pallets and informed us the gun was back there. I observed Sergeant White reach into the rear portion of the wooden pallet and removed this weapon.

Q People's 2?

A People's 2, yes, sir.

Q Well, while we are talking about the defendant Cooper, did you have subsequent conversations with him relating to the charge in this case?

A Yes, sir.

MR. LEEDS: If Your Honor please, may I respectfully request that these conversations only be admitted with reference to the person who is speaking and not to the other defendants?

THE COURT: Yes, that will be the order, each conversation will be received only as to the party shown to have been present.

MR. deDUBOVAY: Thank you.

Q Was there more than one conversation you had with defendant Cooper?

A Yes, sir.

Q All right. Now, directing your attention to the last conversation you had with defendant Cooper in relation to these charges, when and where did this take place and [fol. 80] who was present?

A Well, actually the last conversation lasted about 15 seconds at Firestone Station, but the one preceding that was a lengthy statement at Firestone.

Q At Firestone Station?

A Yes, sir.

Q What date?

A That was December the 12th, 1964, at approximately 12:00 noon in Room 115.

Q Who was present?

A Mr. Cooper, Sergeant Harold White, Sergeant Gerald Riley, and myself.

Q As I believe you already testified to, he had previously been advised as to his Constitutional Rights under the Dorado case, is that correct?

A Yes, sir.

Q Were the statements he made at this time made freely and voluntarily?

A Yes, sir, they were.

Q Will you relate the substance of that conversation, please?

A That Jesse, first name, a person by the name of Jesse had been to his house on Friday morning at 768 West Colden Street in Los Angeles around 11:00 or 12:00, that he and this person known as Jesse had talked about knocking over a market near Holmes Avenue and 62nd [fol. 81] Street, and that Jesse said that he knew of a couple of men that he could get for the job and later he met Jesse around 61st and Converse Avenue. About that time two other persons showed up in a 1957 Ford. One of them was a tall Negro fellow and the other was a male white. They had a brief conversation at that location about robbing the market and some conversation was had as to who was armed, or who was going to be armed.

They then went to the vicinity of 60th and Converse Avenue where he let off Jesse, the tall male Negro fellow and the white man, and then drove his car in front of the small market on Holmes Avenue, parking it one or two car lengths above or north of the market, that he went in first to cash his check and he had a conversation with the lady pertaining to cashing the check, that he went back outside to get his check and when he come back in Jesse and the other two people come in right behind him, that he again tried to cash the check but the lady wouldn't accept it. During this period of time he noticed that Jesse was at the rear portion of the store along with an old male clerk and that the other two persons, the tall Negro fellow and the white man were at the front portion of the store, and there was some type of commotion in the rear portion of the store, and he observed Jesse strike the man several times with a pistol or revolver, and he heard a shot go off and he thought the shot came from directly behind him. As he turned around he noticed a bluish or [fol. 82] smokish appearance substance in the center portion of the store directly behind him. And after that all four of them ran and got back into the vehicle which was parked in front of the store, went north on Holmes Avenue through the traffic signal westbound across the tracks, then south again a block or so where he left Jesse, the tall Negro fellow, and the white man. They got into the white man's green Ford and left. And also—

Q Did he state what the purpose, if any, was of trying to cash his check?

A Yes, sir, he did.

Q What was that?

A That was his part of the deal, was to cash his check so the clerk would open the cash drawer. That way Jesse would know where the money was and it was Jesse's part to get the money and it was the other two persons' part of the job just to stand by and see that everything went okay. There had been no agreement as to how they were to divide up the money and that it was Jesse's idea to knock over or rob the place, and that Jesse had previously told him it should be between six or seven thousand dollars

in the market on that one particular day. There was some previous conversation as to if he or Jesse had previously cased it but I don't recall what that was.

Q Do you recall who he finally said was armed and who wasn't?

[fol. 83] A He said Jesse was armed and I believe he said the white man was armed.

Q Did he say anything about the woman owner of the store going for a gun or having anything to do with a gun?

A Yes, sir, he did. He stated when the commotion or some kind of action started at the rear portion of the store with Jesse and the old male clerk the female clerk grabbed a gun from underneath the counter and that he grabbed it from her hand and took it away from her and kept it in his pocket in the car and he didn't think the other fellows involved in this robbery or this stick-up realized or knew that he still had the gun that he had taken from the lady in the market.

Q All right. Now, calling your attention to the gun marked People's 3, did you recover that gun?

A Yes, sir, I did.

Q Was it loaded or unloaded at the time of recovery?

A It was fully loaded.

Q From whom did you recover it?

A From the vehicle occupied or that was in the possession of Mr. George Rhone.

Q What date was this?

A December 13th, 1964, at 1:00 a.m.

Q And for probable cause, had you been advised of [fol. 84] defendant Rhone's part in this robbery and shooting or attempted robbery and shooting prior to the arrest?

A Yes, sir, not by the name of George Rhone, however.

Q By another name?

A Yes, sir.

Q All right, sir. Will you tell us, was defendant Rhone arrested at the time of recovery of this gun?

A Shortly prior to the recovery, yes, sir.

Q Will you tell us the details of the arrest and the recovery of the gun, please?

A The arrest took place approximately 1:45 or 1:50 a.m. December 13th, 1964, in the interior portion of Casablanca Bar, 15320 South Avalon, County of Los Angeles. Present at that time were Sergeant White, Riley and myself. After the arrest—

Q He was arrested on the charge that we are now here in court on?

A Yes, sir, he was. We took him from the interior portion to the outside of the premises, handcuffed him, and advised him of the charge that he was arrested on and advised him of his Constitutional Rights which were that anything he said would probably be used in court against him, that he had a right to have an attorney and to remain silent during the entire investigation.

[fol. 85] Q All right, sir. And where was the car that—

A It was a '52 Ford, green '52 Ford hardtop, and it was parked on the west side of Avalon Boulevard approximately 50 to 75 yards north of the Casablanca Bar.

Q Did you ask him if you could search the car?

A I don't believe we did in those exact words. I asked him where his car was that he arrived in and he stated then it was across the street.

Q This was after you had given him the advice as to his Constitutional Rights?

A Yes, sir, it was.

Q And whereabouts in the car was this?

A This weapon depicted in People's Exhibit Number—

Q Three.

A Three was located in a suitcase in the trunk area of the '52 Ford, License Number '64 California, Henry Henry X-ray 072.

Q All right, sir. Attached to the gun at this time is an envelope, a small Manila envelope. Do you recognize the envelope?

A It is similar in appearance to—

Q Well, there is a tag attached to it.

A Yes, sir.

Q Property tag.

A Yes, sir.

[fol. 86] Q Are you familiar with the tag?

A Yes, sir, it is written in my name—or, excuse me—in my handwriting.

Q I see. Did you place something in this envelope?

A Yes, sir.

Q What was that?

A Numerous live rounds of .22 ammunition.

Q I note that there are what appear to be .22 bullets in this envelope. Those are the ones you recovered from the gun, is that correct, and—where did you recover the shells?

A They were in the individual firing chambers of the revolver itself.

Q Now, relating to defendant Rhone, did you have subsequent conversations with him in relation to this charge?

A Yes, sir, we did.

Q Was there more than one conversation?

A Yes, sir, there was.

Q Calling your attention to the last conversation, when and where did this take place?

MR. LEEDS: If Your Honor please, may I have the foundation laid for the conversation with the defendant?

MR. deDUBOVAY: This is what I am going into right now.

[fol. 87] THE COURT: I think that is what he is trying to do.

MR. LEEDS: I am sorry.

MR. deDUBOVAY: I asked when and where.

MR. LEEDS: I want to know—

THE COURT: And the persons present.

MR. LEEDS: The persons present, also if he was advised of his rights.

MR. deDUBOVAY: I can't ask all questions at once. I shall get to them.

Q When and where did this last conversation take place?

A At approximately 2:15 a.m. at Firestone Station on December 13th.

Q Who was present?

A Excuse me. Yes, 2:15 a.m., Firestone Station, December 13th, 1964. Present were Sergeant Harold White, Sergeant Gerald Riley, Mr. George Rhone, and myself.

Q Were the statements made by the defendant at that time made freely and voluntarily?

A Yes, sir, they were.

Q And I believe you previously testified that he had previously been advised as to his Constitutional Rights under the Dorado case?

A Yes, sir, he had been.

Q Will you relate the substance of that conversation? [fol. 88] A He stated that he and a person known to him as Glen had met at his sister's house on West Spruce Street in the City of Compton Friday morning, which was December 11th, 1964, and while all of them were at that location they had a conversation about robbing or knocking over a small market in the Los Angeles area, and there was some conversation as to who was to be armed on this. And after the conversation everyone agreed they were going to knock over the market, he and Glen got into Glen's '52 Ford and went up to the area of the market, and that Bosby and Cooper left in Cooper's vehicle and it was a pre-arranged deal, they were supposed to meet in the vicinity of the market. I asked him if this market was around 61st or 62nd and Holmes and he stated yes, that it was. I asked him what his job was and he stated just to look out and see that everything went okay. I asked him what happened on the inside of the market and he stated that it was Cooper or this other person, this other male Negro, was to go up and cash the check, and Bosby was at the rear portion of the store, and that he and Mr. Rhone and Mr. Harrington were at the front portion of the store and he saw Mr. Bosby with a gun in his hand either slapping or striking the old clerk, old male clerk in the market. And that about this time Rhone stated that he observed the lady clerk in the market pull a gun from beneath the cash register or beneath the counter, and that [fol. 89] the other fellow Cooper had grabbed for the gun and he had grabbed her by the wrist or by the throat, and that Cooper had taken the gun away from the lady. And he also saw Harrington pull a gun from either his waistband or his pocket and fearing that Harrington was going to start shooting he took the gun away from Harrington. Then he heard a shot and he thought the shot

was from the rear portion of the store. And I asked him who was in the rear portion of the store and he stated Jesse Bosby or Jesse was at the rear portion of the store. I said, "When the shot went off who was in the front portion?" He said himself, Cooper and Harrington. And after that they all got back in, I believe he said Gil's car or Cooper's car and left and went back to the vicinity of approximately one block west of the PE Tracks immediately a block or two north of the store.

Q Did he state whether after he heard this shot he saw whether anyone was hurt or not or shot?

A I don't recall.

Q All right. Going back to his statement about the conversation in the apartment relating to holding up the market, did he state who was present at that time?

A Yes, a person known as Glen, Jesse, Bosby, and Gil Cooper. I believe he referred to Mr. Bosby and Mr. Cooper as just Jesse and Gil. However, we showed a mug shot to Mr. Rhone of Jesse Bosby and asked him if that was the person that was at the apartment regarding the plan-
[fol. 90] ning of this robbery and he said yes. We also showed him a picture of Mr. Harrington at a subsequent time and he stated that was the same person known to him as Glen and Glen was a San Quentin escapee and he had a Japanese wife who lived on the west side near Crenshaw and the Baldwin Theater.

Q Now, did you have a conversation with defendant Bosby in relation to this charge?

A Yes, sir, we did.

Q All right. And when and where was this?

A The first time was at the place of his arrest.

Q Well, did you have more than one conversation?

A Yes, sir, we did.

Q All right. And when and where was the last conversation?

A At Firestone Station in Room 115 at approximately 3:00 p.m. on December 12th, 1964.

Q Who was present at that time?

A Mr. Bosby, Sergeant Gerald Riley, Sergeant Harold White, and myself.

Q Were the statements made by defendant Bosby made freely and voluntarily?

A Yes, sir, they were.

Q Had he been given the advice of his Constitutional Rights?

A Yes, sir.

[fol. 91] Q All right, sir. Would you relate the substance of that conversation?

A He stated he desired to call his attorney first, Mr. Earl Broady. From the interrogation room we went back to the detective bureau, he made a call, and we returned to the interrogation room. We asked him if he completed his call to his attorney and he stated yes, he had. At that time we had a conversation with Mr. Bosby regarding this offense.

Q Will you relate the substance of that conversation?

A He stated that he didn't know the other two people involved in it, that he only knew Gil Cooper, he had known Gil Cooper for approximately nine months. We asked him what the description was of the other Negro and he said just a little bit taller than him, he was about 30 years old, he lived in Compton, and he was a construction worker and he drove a green or blue '56 Buick. We asked him for the description of the white man involved and he stated he had red hair, about 30, six feet to six feet one. We asked him what he was to do on the robbery or the caper itself. He stated that he was to go in and cash his check and when he went inside the old man, the old male clerk stated, "You are with him" and Mr. Bosby said, "No, I am not with them" and at that time the old male clerk—

[fol. 92] Q Referring to whom, sir?

A The victim, Mr. Serna, had threw a can of peaches or can of yams at him and there was a big huddle or hassle up at the cash register area at that time, that he and the old male clerk were at the rear portion of the store, and during this hassle at the front portion of the store I asked him who was present at the front portion and he said the female clerk, another male about 30 years old, a white man, the other white man with red hair, and the other Negro fellow and Gil Cooper. He heard a shot

or what he described as a popping off and he thought this pop came from the front portion of the store. And after that he and the other persons involved in the robbery or the caper all jumped back in Gil's '56 green Mercury and left the store. We asked him also—

Q Did he after hearing a pop, did he state what, if anything, happened? Did he observe whether anyone had been hurt or shot or anything?

A I don't recall whether he stated that he did think the old man was shot or someone was hurt. I don't recall. But he grabbed three cans of beer and left and jumped back in Gil Cooper's vehicle. He drove north on the red light and west a couple of blocks and the other two persons, the other Negro fellow and the white man with the red hair, got into another vehicle and left. And later that evening while he was in the Watts area he met the person [fol. 93] known to him as Charles, which we had later identified as being Mr. George Rhone, and the white man, which is Mr. Harrington, around the vicinity of 115th and Wilmington, and that Charles and the white man had taken the gun that was used to shoot the old man with, beat it over the curb several times, and throwed it out the right-hand side of the vehicle onto a lawn on the north side of 115th Street near Wilmington Avenue. From there he, Charles and this white man went to Manwel's Motel in Pasadena, and there the white man dyed his hair from red to black and shaved his moustache and they all agreed they couldn't make any money by staying in a motel and that they needed this money to get out of town.

Q Did he state why he had entered that market?

A Yes, he did, and that was they had all agreed to go in the market to knock it over, to get some money from it and he thought there was around $1,500 or $1,600.00 in the market and possibly there could be six or seven thousand in it. In substance I believe that is the conversation held at that time.

MR. deDUBOVAY: Cross examine.

MR. LEEDS: No questions, Your Honor.

MR. SCHMITT: I will move to strike the conversations with Mr. Cooper on the basis that the foundation for Dorado when read was after the interrogation started, at

the time he was under investigation and he should have [fol. 94] been advised of his rights prior to the time that he was. I have no questions.

THE COURT: Do you want to be heard on that, Mr. deDubovay? I don't quite understand. Do you understand the objection?

MR. deDUBOVAY: I believe, counsel, the only statements that were made prior to the Dorado advice being given was when the witness and his partners inquired of defendant Cooper if the Mercury was his or not and he replied yes, and I believe they inquired of him whether he was in fact Cooper, Gilbert Cooper, and to which he replied yes. Up to this time apparently they weren't sure that he was Mr. Cooper. They couldn't very well advise him until they knew they were talking to the person they were to accuse and it was at this time he gave him the advice that you are under arrest and gave him advice, and then everything else was under the advice.

THE COURT: My notes indicate that at the time that the defendant was arrested he was then advised of his rights.

MR. deDUBOVAY: Yes, Your Honor. That was the witness'—

THE COURT: Subsequently they had a conversation at the station.

MR. SCHMITT: If the Court please, the record will speak for itself. The Officer testified that he inquired of the man if he was Gilbert Cooper. He told him he was. [fol. 95] He asked him if that was his car and he said it was. He asked him if he had been driving it the previous afternoon. He said he was. At that time Mr. Cooper made some statements about the gun, they went back, they found the gun, located it, and at that time he was placed under arrest and at that time and that time only was he advised of his rights.

THE COURT: I don't agree that that is the sequence. The record will reflect.

MR. SCHMITT: The record will reflect if I am in error.

THE COURT: I had that noted that at the time of the arrest he was then advised of his rights and thereafter

the inquiry and the conversation at the station was related. The motion will be denied. If I am in error there is another court that will correct it.

MR. SCHMITT: I realize that.

THE COURT: I had according to my notes the arrest and the defendant then being advised of his rights and then the conversation that was testified to which took place at the station. The motion will be denied. Do you wish to cross examine the witness?

MR. SCHMITT: No questions.

MR. LEEDS: No questions, Your Honor.

THE COURT: All right. You may be excused, Mr. Vaughn, unless there is anything further from either [fol. 96] counsel in this matter, of this witness.

MR. deDUBOVAY: Nothing further of this witness, Your Honor, at this time.

THE COURT: You may be excused.

MR. deDUBOVAY: May the exhibits heretofore marked for identification be received in evidence, Your Honor?

THE COURT: Let's see, the exhibits heretofore marked for identification People's 1 through 8 will be received in evidence bearing the same numbers in evidence as they have been marked for identification.

MR. deDUBOVAY: People rest, Your Honor.

MR. SCHMITT: At this time I move to strike the conversations. Originally my objection was overruled regarding the defendant's knowledge that there was so much money in the store at the time. There was an offer of proof. There has been no proof offered to substantiate this knowledge.

THE COURT: Motion to strike the testimony relating to the conversations?

MR. SCHMITT: No, not the conversations, to the witness' statement as to how much money was in the store prior to the robbery, and the People made an offer of proof that they would show that the defendant had knowledge that there was so much money in the store prior to that time, and no offer of proof has been made and I move to renew my motion to object to and strike any testimony on that matter.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 107
Apr. 30, 1965

Present HON. MARK BRANDLER, Judge

298977

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

JESSE BOSBY, GILBERT COOPER,
GLEN MARTIN HARRINGTON and GEORGE RHONE

Deputy District Attorney P Marin; Defendant Jesse Bosby with counsel, J Rosen; Defendant Gilbert Cooper with counsel, Deputy Public Defender J Moore; Defendant Glen Martin Harrington with counsel, R Walton and Defendant George Rhone with counsel, W Gordon, present. Advanced from May 10, 1965. Each: Defendant's motion to sever is argued and denied. Restored to trial calendar on May 10, 1965, 9 A M. Remanded.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 107
May 7, 1965

Present HON. MARK BRANDLER, Judge

298977

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

GLENN MARTIN HARRINGTON

Defendant not present. Petition for Court order is denied. Defendant notified by mail.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 107
May 10, 1965

Present Hon. Mark Brandler, Judge

298977

The People of the State of California

vs.

Jesse Bosby, Gilbert Cooper,
Glen Martin Harrington and George Rhone

Each: Cause called for trial. Deputy District Attorney Al Warnberg; Defendant Jesse Bosby with counsel, J Rosen; Defendant Gilbert Cooper with counsel, J Moore; Defendant Glen Martin Harrington with counsel, R Walton; and Defendant George Rhone with counsel, W Gordon, present. Defendant's motion to sever denied. Defendant Cooper's motion to dismiss under Section 1382 Penal Code denied. Defendant Harrington's motion to withdraw his petition, heretofore ruled on, is granted. The prior ruling is also set aside, without prejudice. Each: Trial is continued to June 14, 1965, 9 A M. Remanded.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 107
Jun. 14, 1965

Present HON. MARK BRANDLER, Judge

298977

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

JESSE BOSBY, GILBERT COOPER,
GLEN MARTIN HARRINGTON and GEORGE RHONE

Each: Deputy District Attorney A Warnberg; Defendant Jesse Bosby with counsel, J Rosen; Defendant Glen Martin Harrington with counsel, R Walton; Defendant Gilbert Cooper with counsel, Deputy Public Defender J Moore and Defendant George Rhone with counsel, W Gordon, present. Cause called for trial and transferred to Department 110. Witnesses instructed. Remanded.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 110
Jun. 14, 1965

Present HON. JOSEPH A. WAPNER, Judge

298977

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

JESSE BOSBY, GILBERT COOPER,
GLEN MARTIN HARRINGTON and GEORGE RHONE

Each: Cause, transferred from Department 107, is called for trial. Deputy District Attorney Al Warnberg; Defendant Jesse Bosby with counsel, Joseph Rosen; Defendant Gilbert Cooper with counsel, Deputy Public Defender John Moore; Defendant Glen Martin Harrington with counsel, Richard Walton and Defendant George Rhone with counsel, Walter Gordon, present. Defendant's motion for severance is argued and denied. Defendant Harrington: The second prior is amended to show the prior conviction as Attempted Burglary. Defendant re-arraigned on priors and he admits the priors. The Court orders a daily transcript, original and five (5) copies. Counsel voir dire the prospective jurors. Prospective jurors admonished. Continued to June 15, 1965, 9:45 A M. Remanded.

[fo]. 3]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT No. 110

HON. JOSEPH A. WAPNER, Judge

No. 298,977

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

JESSE BOSBY, GILBERT COOPER, GLEN MARTIN HARRINGTON and GEORGE RHONE, JR., DEFENDANTS

REPORTERS' TRANSCRIPT ON APPEAL

June 14, 15, 16, 17, 21, 22, 23, 24, 25, 28, 29, 30, July 1, 2, 6, and 28, 1965.

APPEARANCES:

For the People:

EVELLE J. YOUNGER, District Atty., By ALVIN H. WARNBERG, Deputy D.A., 600 Hall of Justice, Los Angeles 12, Calif. 626-3888

For Defendant Bosby:

JOSEPH M. ROSEN, 139 N. Broadway, Suite 611, Los Angeles, Calif.—MA 8-4207

For Defendant Cooper:

ERLING J. HOVDEN, Public Defender, By JOHN M. MOORE, Deputy P.D., 402 Hall of Justice, Los Angeles, Calif.—629-2451

For Defendant Harrington:

RICHARD A. WALTON, 1515 N. Vermont Ave., Suite 809, Los Angeles, Calif.—NO 32205

For Defendant Rhone:

WALTER L. GORDON, JR., 4107 South Central Avenue, Los Angeles, Calif.—231-2407

[fol. 3-A] LOS ANGELES, CALIFORNIA;
MONDAY, JUNE 14, 1965. 2:36 P.M.

THE COURT: People versus Jesse Bosby, Gilbert Cooper, Glen Martin Harrington, and George Rhone, Junior.

The record may indicate these proceedings are outside the presence of any prospective jury.

Do you gentlemen have a motion to make?

MR. WALTON: Yes, your Honor.

THE COURT: All right, make yours, Mr. Walton.

MR. WALTON: Your Honor, on behalf of the Defendant Harrington I make a motion to sever his trial from those of all the other defendants for reasons which are stated in the Memorandum, which should be in the Court's file.

Now, this motion has been made prior to this time and denied in Department 107, its denial being without prejudice to renewing it at such time as the case was assigned out for trial, and I renew it now at this time.

The basis of the motion is set forth to some extent in the Memorandum in the Court file, and that is that all three of the other defendants, Bosby, Cooper, and Rhone, have made statements to police officers purportedly, the effect of which is not only to incriminate themselves but also to bring the Defendant Harrington within the realm of the criminal scheme which is the basis of the People's case.

Now, the excerpts which are there as a part of the [fol. 4-A] Memorandum were taken from the preliminary hearing transcript. In the District Attorney's file are much more extensive statements more extensively incriminating the Defendant Harrington.

And again I say to your Honor that he has made no statement which tends to incriminate him.

Now, we have not only the rather meager statement which has been brought to your Honor's attention, but potentially statements that are damaging in their impact and that are broad in their scope; not those that were introduced at the preliminary hearing, at which hearing

the officer was merely testifying from memory. There are transcripts of statements given by certain of the other defendants. There is extensive examination and interrogation of those defendants on the issue of the participation of the Defendant Harrington.

And it is inconceivable to me that any jury can limit its consideration of the statements given to the speaking defendant.

And I cannot conceive that the Defendant Harrington can receive a fair trial if there is to be hours of testimony or extensive testimony on the part of police officers relating statements purportedly given by, say, Bosby or Rhone or Cooper. And, incidentally, reaching out and encompassing the Defendant Harrington.

Harrington may be guilty, but that is not the issue. [fol. 5-A] We can concede his guilt for the purpose of this motion.

The important thing that I feel should impel this Court to grant the motion to sever is the fact that he cannot conceivably receive a fair trial if there is to be the substantial evidence of statements of his co-defendants, which I anticipate will be adduced here upon this trial.

I feel that though some burden is imposed upon the People if they are to try this case twice or three times or even four times, and that certainly there is a certain incurrence of cost in trying a case more than once, that these are small considerations when you weigh them against the need to preserve the defendant's right, any defendant's right, and even a guilty defendant's right, to be tried and convicted fairly, if he is to be convicted at all.

Now, my research produced only a single case, Burton versus State; it is 51 Delaware 546, 149 Atlantic 2nd 337, which held that a severance must be granted where a co-defendant has given a confession which is to be introduced in evidence.

And I feel that that is, though, perhaps meager authority or persuasive authority—because we have in California certain notices or intentions given to the problem by at least the District Courts of Appeal—I have cited a case in the Memorandum, People versus Perez, which at the

time the Memorandum was prepared was pending before the Supreme Court on a hearing granted.

[fol. 6-A] The Perez case has since come down from the Supreme Court, and it is in the 62 Advanced California Reports in the June 4th volume.

Unfortunately, the Perez case on the Supreme Court level does not deal at all with the problem of severance. In treating of the statements made by the two defendants there, the Supreme Court has merely stated, "There is a Dorado problem here, fellows; you better resolve it when this case is retried," and didn't deal at all with the question which seemed to trouble the District Court of Appeal so mightily. And that is the inevitable inability of a juror to so compartmentalize his thinking that he will, in fact, and can, in fact, heed the admonition of the Court that he is to consider a statement or a confession only against the speaking defendant and not against absent defendants for any purpose.

If the operation of a severance is to be somewhat harsh in its impact upon the People, I would say that the operation of admitting the statements even with admonitions is doubly harsh against the Defendant Harrington.

There is a felony-murder theory on the part of the prosecution; they might use those statements to show circumstances surrounding the offense, which they are permitted to do under holdings of the Supreme Court, they might introduce those statements for the purpose of establishing degree, which they are permitted to do.

[fol. 7-A] But the obvious effect of even admitting the statements for that purpose is to say to the jurors, "Yes, you can consider these statements against Harrington for fixing the degree of his involvement or the degree of the crime."

If he is guilty on an aiding and abetting theory, he is guilty of first degree murder if, say, Bosby's statement makes it a first degree murder.

And I feel that the interests of justice manditorily require that your Honor grant this motion. This is no small frivolous motion. This gets to the very essence of this defendant's rights to be tried and convicted, if he is to be convicted in a fair manner.

And I hold that he cannot be tried fairly at least if he has to contend with all these phantom statements, which I know your Honor will limit properly in instructions to the jury by which the jury cannot—an admonition which the jury cannot conceivably heed.

MR. ROSEN: May I address the Court, your Honor?

THE COURT: Yes.

MR. ROSEN: In behalf of the Defendant Bosby I wish to join in the motion for a severance.

And I'd like to add to what Mr. Walton has to say that I feel there is authority for it by the United States Supreme Court by logical reasoning.

And they started out in the Delli Paoli versus the United States—I think that is cited in that Memorandum, [fol. 8-A] 352 U.S. 232.

In that case, your Honor, although it was affirmed, where a confession of Defendant A naming Defendant B, but inadmissible with regard to Defendant B, but admitted during the course of the trial—the Supreme Court in a five to four decision held that it was not error because there was enough substantial evidence without that confession to convict Defendant B. But Frankfurter wrote a very strong dissent in that opinion.

And in a later case, as a matter of fact, a 1963 case, in the case of Jackson versus Denno, which is cited at 378 U.S. 368—this is a case which was reversed, where the dissent of Frankfurter became the law—in the Jackson case, it was a New York case where the jury under the New York statute was permitted, on the issue of whether or not a confession was voluntary or involuntary—they heard all of the evidence. Not as we often do where it is heard initially outside the presence of the jury and the judge makes a determination or finding, but under the New York law the jury heard all of the evidence and then found the defendant guilty.

And the Supreme Court held that that New York law allowing the jury to hear all of the evidence and then making a finding or reaching a verdict, that this law was unconstitutional.

And the reason for it was that even if they determined [fol. 9-A] that the confession which they heard was in-

voluntary, if they determined that it was truthful, then they would subconsciously have to use that confession against the defendant.

Now, that is the same principle that is involved here. Even though the Court tells the jury you cannot use or disregard Defendant A's confession as it pertains to Defendants B, C, and D, the Supreme Court said that you can't unring that bell.

And that is exactly what we are faced with here in the trial of this case.

So I will submit it on that.

MR. MOORE: Cooper makes a similar motion, your Honor.

MR. GORDON: Rhone would join, your Honor.

THE COURT: Is there anything, Mr. Warnberg, which would preclude you from—strike that. Let me ask you this.

Are there any statements allegedly signed by defendants which you intend to introduce in evidence?

MR. WARNBERG: No, your Honor. They are statements that are taken at the time of an interview and taken in shorthand.

THE COURT: Well, what I want to know is this. Do you intend to introduce them?

MR. WARNBERG: Yes.

THE COURT: Verbatim?

[fol. 10-A] MR. WARNBERG: Yes, your Honor.

THE COURT: The statements themselves?

MR. WARNBERG: Yes, your Honor.

THE COURT: Are they already in a booklet form of some kind?

MR. WARNBERG: Yes, your Honor. And I believe counsel have seen them already.

THE COURT: Well, are they separate and apart; in other words, each defendant's statement separate and apart?

MR. WARNBERG: Yes, taken individually and separately.

THE COURT: Is there any reason why the statement, for example, of Defendant Bosby cannot be edited so that any reference he makes to his co-defendants can be de-

leted? I imagine you do understand my thinking at the moment?

MR. WARNBERG: Yes, I do.

THE COURT: Since a judge must necessarily and properly advise a jury that the statements of a defendant may be admissible only for use against that defendant, and since counsel is making a motion to sever based upon the principle that any statements made by a defendant should not be used against his co-defendant, because the co-defendant's name and certain acts with respect to him are mentioned therein, why can't it be cured by denying a severance and merely limiting the introduction of the statements, whether they be written or if they be oral by testimony of an officer, advising the officer in advance [fol. 11-A] before, or whoever the person is who testifies with respect to the statement, that when he testifies with respect to the conversation he had with Defendant A, he should not relate anything that A said with respect to B, C, or D?

And the reason I am saying that is this. While I don't think there is any direct authority for the principle or proposition that counsel attempts to enunciate here, I do think in principle and logic and the good administration of justice that their arguments are sound.

Now, I would not wish to grant severance, because I don't think that that is the law today. But I think that it is a sound principle, and I think if we could limit the testimony and the admission of documents, as I have indicated, I don't think that anyone could complain.

Do counsel agree?

MR. WALTON: Well, I don't know that it totally cures the problem, your Honor, at least as Defendant Harrington is involved. Because even an edited statement, let's say, on the part of the Defendant Bosby, as long as your Honor has selected him, for example, is likely to tend to establish the nature of the homicide.

Bringing it within the felony-murder doctrine is likely to establish or tend to establish the degree of the offense. And that certainly reaches out to affect Harrington, if he is thereafter convicted, as being a member of this little

group going in there with the common purpose of robbing [fol. 12-A] this store.

THE COURT: You are now speaking against the theory of a felony-murder doctrine?

MR. WALTON: Yes, to a degree.

THE COURT: Well, I can't go along with you because I'm not going to change that law.

MR. WALTON: Well, to a degree I am, necessarily. But I would point out to the Court that probably in the recent decision of the State Supreme Court certain remarks were made upon that doctrine. That is the case of People versus Washington.

THE COURT: I am familiar with that.

MR. WALTON: The Court there recognized that this doctrine is very harsh and barbaric sometimes in its operation. And I would say that this would be just such an instance.

And consequently, I don't feel that the mere editing or the mere deletion of reference to my defendant will necessarily put that jury in the position where it can logically and reasonably limit the statement of the speaking co-defendant solely to that defendant and not consider it for any purpose against the Defendant Harrington, which, of course, is the thrust and the essence of the admonition.

THE COURT: I'm not going to go that far, Mr. Walton.

Do any of the other counsel wish to comment on the proposal of the Court?

[fol. 13-A] MR. ROSEN: I will.

MR. MOORE: No.

MR. ROSEN: Your Honor, there is another basic reason that I am asking for a severance in behalf of Bosby aside from this. And that is this.

If we should reach the penalty stage in this case, there is always a tendency by a jury to compare the culpability of the various defendants. Now, this always works to the great disadvantage of the one most culpable. But, as I understand the law on penalty, a jury is supposed to consider only that part of the evidence in aggravation or mitigation of the particular defendant and not by comparison.

What I am saying is this, your Honor. If there is only one defendant before that jury, then they are not comparing the penalty between what they have to impose as to that one defendant and other defendants.

And I have seen this happen time and again, that they have imposed the more severe penalty, not necessarily because of the aggravation of the offense, but because of the difference between the co-defendants.

The reasoning is just there; one person who is less culpable will get life imprisonment, the one who is more culpable, because they are giving life imprisonment to the less culpable, they have to punish the more culpable greater, and will reach that conclusion on their determination [fol. 14-A] of penalty.

This is a very important and practical approach to this particular problem. And this is another reason why I am asking for severance.

THE COURT: Apparently you gentlemen don't want to discuss what I proposed to do, because I told you I'm not going to grant your severance.

I can appreciate your arguments. I think that each of them has some logic and some merit to them.

But you either are going to take the part that I want to give you or you're not going to get anything. That is as bluntly as I can put it.

Now, I'm trying to find a middle ground, so to speak. And I think that I'm offering, in a sense, to give you more than any defense lawyer has ever received in this type of case.

The question is, do you want it or don't you? I am just putting it squarely up to you.

As far as I know, it would be an innovation for a trial court to do this. But if you don't want it, I don't have to give it to you.

But I'm going to deny severance.

Do you want what I have offered to you so that I can instruct the District Attorney along those lines or don't you?

Mr. Rosen?

[fol. 15-A] MR. ROSEN: Well, it is not as much as we are asking for. I would prefer severance. But, in the

face of what your Honor has said, I will take what I can get.

THE COURT: All right. Mr. Moore?

MR. MOORE: I will submit it on my motion, your Honor, and your denial of it.

MR. WALTON: I am a little bit unclear whether your Honor proposes to preside over an editing operation or whether your Honor is merely going to advise the District Attorney that it would be better for him to edit the written statements that may be submitted physically, or to at least counsel his witnesses to avoid a possible reference to other defendants.

THE COURT: Well, I'm going to tell him to counsel his witnesses, Number One, with respect to the editing, and I'm going to tell him to delete any references made to other defendants by a particular defendant.

And I assume he will advise you in advance of what he is going to delete, since he will know what he is going to delete.

MR. WALTON: Well, I am not so interested in what is deleted, as I am in what remains.

THE COURT: Well, maybe I'm trying to take on more than I should. I don't know what it entails because I haven't seen these statements. Maybe it is not even possible to do it. I was hoping that it might be possible so [fol. 16-A] that we could try and give you gentlemen a little bit of what you are asking. Not because I'm trying to give—to use an old cliche—to give the dog a bone at all. That is not the point.

The point is merely that I was trying to make it as fair as I possibly could within the framework of the law.

Now, I don't know if it is possible to do this kind of a job. I certainly don't want to get into something that is not possible.

I haven't seen these statements. I don't know whether they go along smoothly, for example, for ten, twelve pages, and then make a reference to another defendant, whether he can just delete it, or whether you might have to chop a sentence off here and there, and a paragraph here and a paragraph there.

You see, I haven't read these; you gentlemen have.

Is it possible to handle it this way, Mr. Warnberg, or not?

MR. WARNBERG: It is in the realm of possibility, your Honor. I think it is a good suggestion.

There are places, however, where someone else is referred to about naming that person, like—this is an example. At one time the officer asked a defendant who was behind the bar and the answer is, "The old man."

Now, there is no reference to a specific defendant, but—like there would be no reason to chop that out, I don't [fol. 17-A] think.

MR. WALTON: I think the reference is to the victim, anyway.

MR. WARNBERG: Yes, that particular question was with reference to the victim. But I can refer to other situations where they are questioning one defendant and he will have made an answer that, "Well, that's what the other guy did," something to that effect.

THE COURT: Certainly where at least four persons are involved in a robbery, referring to another guy would not be detrimental.

All right. I would instruct you, Mr. Warnberg, to instruct your witnesses that when they are testifying with respect to a conversation with a particular defendant, they not refer to anything with respect to any of the other defendants in the conversation.

And when it comes to any written material, for you to delete any other reference to any other named defendant.

MR. WARNBERG: That is, where he is named?

THE COURT: That's right, where he is named.

MR. WARNBERG: I will do this, your Honor. I will try and sit down with counsel and—

THE COURT: I would suggest you do it ahead of time. Then you tell counsel what you intend to do and you let them check it over, and if they have any objections, they can voice them.

[fol. 18-A] MR. WARNBERG: Yes.

THE COURT: The motion to sever will be denied as to each defendant.

MR. ROSEN: Just one moment.

* * * * *

[fol. 3] LOS ANGELES, CALIFORNIA,
THURSDAY, JUNE 17, 1965: 2:40 P.M.

THE COURT: Do you gentlemen waive reading of the Information?

MR. WALTON: We waive for Harrington, your Honor.

MR. WARNBERG: People waive.

MR. GORDON: Waive for Rhone.

MR. MOORE: Waive reading.

MR. ROSEN: Yes, your Honor.

THE COURT: Ladies and gentlemen of the jury, the defendants and each of them have entered pleas of not guilty to the charge set forth in the Information.

Let me explain to you what we're going to do from here on. We're going to take a recess as soon as we finish now, fifteen minutes, and we're going to come back and we're going to hear the opening statements of counsel, if there are any.

If there aren't going to be any, well, counsel can advise me now and we won't go any further.

Are you going to make an opening statement, Mr. Warnberg?

MR. WARNBERG: Just a brief one, your Honor, yes; just an outline.

THE COURT: All right. And then we will recess until Monday morning. Now, normally we don't do this; we don't work four days, we work five. But my son is graduating from school tomorrow and I think it is a re-
[fol. 4] sponsibility of a parent, also a very happy moment, and I think one of the attorneys has a child who is graduating from school, too. So we won't work tomorrow, but we will come back Monday morning ready to proceed with evidence in the case. I will expect counsel to be ready to present the evidence at that time.

We will have everything out of the way, including the opening statements this afternoon, and be ready to go Monday morning.

At this time I will admonish you that you are not to discuss the case among yourselves or with anyone else on any subject connected with the trial. You are not to form or express an opinion with respect to the case until it has been finally submitted to you for your decision.

We will take a fifteen-minute recess.

(Recess.)

THE COURT: The record may indicate the defendants and each of them are present with counsel, the jury is fully constituted and in the jury box, including the two alternates.

Counsel, may it be stipulated that after all recesses, unless otherwise notified by counsel, that all of the defendants are deemed to be present with counsel, and that the jury be deemed to be fully constituted and in the jury box?

[fol. 5] MR. ROSEN: Yes, your Honor.

MR. MOORE: So stipulate.

MR. GORDON: So stipulate on behalf of Rhone, your Honor.

MR. WALTON: So stipulated.

MR. WARNBERG: So stipulated, your Honor.

THE COURT: Do you wish to make an opening statement?

MR. WARNBERG: Just a brief one, your Honor, if I may.

THE COURT: Go ahead.

MR. WARNBERG: Thank you, your Honor.

May it please the Court, Judge Wapner, counsel for the defense, and ladies and gentlemen of the jury:

If I may just present a brief outline to you as to what the People expect to prove in this case so that you may, if you wish, get this outline at the very beginning, and it may help you, I hope, as you hear the evidence as we present it here in court.

Remember now, that what I say is not evidence and I don't intend to state that it is evidence. But it is merely for the purpose of presenting an outline to you. And we contend that the evidence isn't too complicated in this case.

[fol. 6] I think that after you hear the evidence, it will be rather simple, the issue that you're going to determine eventually, as we have already indicated to you.

But, briefly it's this, and it's just an outline, and I'm not going to spend the time this afternoon to tell you what each witness is going to say. I'm going to have you listen to each witness on the stand as you hear it, and you eviluate the evidence, and then you bring in the verdict.

But briefly it's this.

Mrs. Robbins operates the store, as we have already indicated, at 6126 South Holmes Avenue. Now, about 2:30 p.m. on that date of December the 11th, 1964, the four defendants entered the market.

Now, I'm not going to tell you as to what each witness is going to say. All four defendants were identified. But briefly it's this.

Two defendants entered first and they engaged Mrs. Robbins in a conversation concerning the cashing of a check. And in that conversation it was ascertained that one of the defendants that wanted to cash it didn't have this check with him. So he asked to go outside where he could get it. And naturally Mrs. Robbins wanted to see the check before she cashed it.

Well, the defendant left to go outside to get the check. Then the other defendant that went in with him at that [fol. 7] time went over to another part of the store.

It later developed that that is where Mr. Serna was located. That is the deceased in this case.

Following that, the other two defendants came in and went over and talked to Mrs. Robbins again about the check.

Now you have all four defendants in the store. In other words, two defendants entered first, one of them left to go outside, and then back comes the other two defendants, so you have all four in the store now. They are over there by the register. She is looking at the check. And in the corner of her eye she sees the deceased and the other defendant with a gun pointing at him.

She grabs in her drawer for her gun. The defendants who are standing there with her grab her, take the gun

away from her, and about that time the shot she hears over there where Mr. Serna and the defendant was.

She got out of the store. The defendants all left. And, by the way, they left in a Mercury automobile. Before the entry into the store, we will have a witness to present to you who saw the defendants in that Mercury car go into the store and come out and left. The license number was obtained.

That Mercury was seen to take off by another witness, who was a crossing guard attendant. The license number was obtained later.

[fol. 8] There was another witness, who lives, I think, two blocks away, saw an exchange between that Mercury and a Ford automobile, and the occupants of the Mercury went into the Ford, and vice versa.

Now, in addition to that, we're going to present to you eventually investigation by the Sheriff's Department, statements of these defendants, some of them.

And we're going to ask you eventually then to consider all the evidence as we present it to you.

So, basically it's merely this. The defendants enter the store; it is either an attempted robbery or robbery. And, as we have already elicited to you, it is a homicide committed in the perpetration of a felony.

I think with that I will close my opening statement. I don't think the facts are too complicated. If you wish, just keep that as an outline in the case, and I will ask you to evaluate the evidence as you hear it from the witnesses themselves.

Thank you.

THE COURT: Mr. Rosen, do you wish to make an opening statement?

MR. ROSEN: I will reserve opening statement.

THE COURT: Mr. Moore?

MR. MOORE: Reserve opening statement.

MR. WALTON: Reserve opening statement.

MR. GORDON: Reserve opening statement.

[fol. 9] THE COURT: Ladies and gentlemen, we will recess at this time. I will admonish you again that you are not to discuss this case among yourselves or with anyone else. You are not to form or express an opinion

with respect to the case until it has finally been submitted to you for your decision.

Now, normally I give you this admonishment at every recess, because this admonishment carries through during the entire trial until the conclusion of the trial and until you go into the jury room to actually start deliberating on the case.

I have already discussed it with counsel, and they are willing to stipulate that it may be deemed that at every recess I just told you what I have repeated so many times during the course of selecting the jury, and again when we just recessed, and as I have just admonished you.

Now, this admonishment is a very serious thing. I want to impress upon you the fact that you and you alone decide the case, and you decide it only after deliberations in the jury room among the jurors, but you do not discuss it at any time prior to going into the jury room for that purpose.

Don't talk about it together, don't talk about it with anyone else.

Just because I don't give you the admonishment every [fol. 10] time, merely because counsel have stipulated that it may be deemed that I have given you the admonishment, doesn't mean that it is any less important. Do you understand that?

VOICES: Yes.

THE COURT: As a matter of fact, I will probably, at the conclusion of every day's session, remind you about the admonishment to impress it upon your minds.

So with that I will ask you to have a nice weekend. We will see you Monday morning at 9:45.

(Whereupon an adjournment was taken at 3:11 o'clock p.m. until 9:45 o'clock a.m., Monday, June 21st, 1965.)

[fol. 11] LOS ANGELES, CALIFORNIA,
MONDAY, JUNE 21, 1965; 9:55 A.M.

(The following proceedings were had in open court, outside the presence of the jury:)

THE COURT: The record may indicate that these proceedings are outside the presence of the jury.

Mr. Walton, do you have a motion you wish to make?

MR. WALTON: Yes, your Honor. I am renewing, prior to the commencement of any testimony, the motion to sever the trial of the defendant Harrington from the trials of the other defendants, and I'm not doing this really to tax the patience of the Court, although this is the third time I have made this motion.

I am doing it because the further we get into this trial the more I fear and have forebodings that the trial of Harrington is going to be a sheer mockery.

Because now I understand—and this is information which I have learned since I made the motion last Monday—now I have learned that probably all three of the co-defendants will, in fact, take the stand and testify to things which, perhaps, are of dubious relevance on the issue of guilt or innocence; testify maybe that they were there and they did this and Harrington did that, and so forth.

Now, all of this has the effect of perhaps diminishing or minimizing the participation or the culpability of the [fol. 12] testifying defendant, which situation, I think, is probably relevant on penalty but not in the issue of guilt or innocence, because the effect of the testimony makes them no less guilty, if I understand from counsel what the situation is going to be.

Harrington is caught in the dilemma of having two prior convictions, which he has already admitted prior to the commencement of the trial, one of which is for robbery.

Now, he is in a pretty tight corner. If he takes the stand and is impeached on the robbery convictions, I

don't think any adminition or instruction of this Court can guarantee that that jury is not going to consider his record against him and resolve all those issues to his detriment, even though they will be instructed that they can only consider the effect of the prior convictions on the issue of credibility.

Now, there is a Federal case which I desire to call to your Honor's attention, in fact two of them, because the Federal Courts have taken this comment problem in a much more sophisticated manner. They have taken it in a more sophisticated manner and had it presented to them than any State Court that I know of.

I have to acknowledge at the outset that all of these cases are pre-Griffin, but they are all very recent.

The case of De Luna versus United States, 308 Federal 2nd 140, it was a 1962 case.

[fol. 13] There were two defendants in the De Luna case. It was a narcotics prosecution in Texas.

One defendant took the stand and said that the narcotics which an officer had seen him throw from a car window had been passed to him by De Luna, who did not take the stand. Gomez was the co-defendant.

Gomez's lawyer three times commented on the failure of De Luna to take the stand over objection. Each time De Luna's counsel objected.

The case went up on appeal. The Fifth Circuit Court of Appeals said that this was a situation where Gomez's lawyer was under a duty, if he assumed—if he regarded this as being his duty—to comment on the co-defendant's failure to take the stand, and that the Judge in that court should have granted a severance. And the conviction was reversed.

Then the Government petitioned for rehearing, saying that, well, this opens the door to collusive action on the part of co-defendants. If one person can cause a mistrial merely by getting up and commenting on the failure of a co-defendant to take the stand, then this leaves it to the defense attorneys to determine whether or not in a particular case, assuming the facts are correct and proper, this leaves it to the defense attorneys to cause the mistrial.

So the Government petitioned for rehearing. And, in a short opinion denying the rehearing at 324 Federal 2nd 375—and that is 1963—the opinion said—the [fol. 14] majority said:

> "The overriding consideration in all criminal cases is measured justice according to the Constitution. The inconvenience of a severance and the possibility of a mistrial, if there should be a joint trial of co-defendants, do not tip the scales in favor of the Government when an accused's right to silence hangs in the balance."

[fol. 15] So, then, after the DeLuna case came the case of Hayes vs. United States, 329 Federal 2d 209. That is a 1964 case, brand new.

The DeLuna point was raised in the Hayes case. In the Hayes case there were five co-conspirators, two of whom testified, three of whom did not. The trial judge prohibited the attorneys for the testifying defendants to comment on the failure of the other defendants to testify. The Government, in its brief, kissed the point off in a footnote.

The Court said despite the fact that the Government feels that is a frivolous point, we consider it to be "substantial and troublesome," and that phrase is directly quoted from the opinion.

There the Court noted that the testimony of those defendants who testified did not have the effect of incriminating the three who did not testify, subsequently affirmed the conviction but said at page 222: "The problem here presented requires the weighing of the rights of the testifying and the non-testifying defendants and the preservation of the constitutional right to a fair trial guaranteed to each defendant. Upon the peculiar facts of this case, our finding of no prejudice requires an affirmance upon this issue. We limit our decision strictly to the precise facts of this particular case."

So, the Hayes case declined to go any further than [fol. 16] the rather unusual circumstances of that case where there wasn't any incriminatory testimony by those who testified, but I think if we take the converse of it

and make a reasonable construction of what this Court's attitude is, had those defendants who testified, in fact, incriminating those who did not, I have the feeling that the Court might very well have held the judge's muzzling of the attorneys for those who testified to be error.

The DeLuna court held that there was a situation where the defendant was trapped between his right not to testify, his right to maintain silence, and the duty upon the attorney for the co-defendant to comment or to at least discharge his obligation in a manner that he saw fit.

Unfortunately, the Griffin opinion, doesn't comment on Hayes or DeLuna or any of these cases, and it may be that they are all suspect.

Now, in view of the holding of the Griffin vs. California, if I understand from my co-counsel what the situation is likely to be on the guilt phase of this trial, Harrington's right to maintain his own silence becomes an utter farce.

Now, even in Modesto, even in the Modesto case where the court in this State was upholding the comment rule, claiming that the Federal decisions to the contrary were based on statute, not on any constitutional right, even [fol. 17] in the Modesto case the Court commented that there might be reasons other than the usual for a defendant not being placed on the witness stand, and the reason they cite specifically is the very reason which pertains to this case.

In People vs. Modesto, 62 Advanced Cal. 452, at 469 and 470 the Court said:

[fol. 18] "It is true that the defendant might fear that his prior convictions will prejudice the jury, and therefore another possible inference can be drawn from his refusal to take the stand. The inference that the jury is authorized to draw from the failure to take the stand, however, need not be the only plausible one to be rational under the due process clause. Moreover, without the comment rule, the defendant still faces the dilemma of choosing to testify and having his prior convictions introduced

or remaining silent and not giving his evidence to the jury."

I cannot visualize a fair trial for Harrington in this courtroom, despite what I know will be your Honor's best efforts to see that he will be given one, despite what will be my best efforts that he is given one, if these three defendants are going to take the stand and he doesn't, and I presently do not plan to put him on, principally because of fear of the consequences of having these prior convictions introduced—if that is the situation, then he is a dead duck, no matter what the quality of the People's case against him; and consequently, your Honor, I feel the only way that we can be given a fair trial is to be severed out of this particular case.

There is no vast prejudice to the People. There is no witness who is of elderly age who is going to die next [fol. 19] week perhaps. The only inconvenience to the People is the inconvenience of having to try this case over three times or four times, and those are small considerations, your Honor, when they are thrown into the scale against the right of a defendant to have a fair trial and to be convicted fairly, if he is going to be convicted at all.

[fol. 20] THE COURT: I wish it were the only other danger, who died—that may not be too pertinent to what you said, but I couldn't help but think a lot of awfully young people die today.

MR. WALTON: I am talking about perpetuation of testimony situations, of course.

THE COURT: At any rate, the motion will be denied.

MR. MOORE: I have one, your Honor. At this time we will renew our motion previously made to dismiss under the 60-day provision of 1382 and the rights of speedy trial.

We have made this, I think, twice now or three times. Each time the defendant has opposed the continuances. It has now been over six months, I believe, from the arrest of this defendant and it is our contention that it is a violation of his rights to a speedy trial.

THE COURT: This is the first time I have heard the motion and I haven't the slightest idea of why, till I

read the jacket, of course, why these previous continuances were granted.

I note that on March 24 it says, "On motion of all defense counsel for additional preparation, continue to May 10 pursuant to 1382 P.C.; Defendant Cooper objects."

I don't understand that "on motion of all defense counsel for additional time," and then you object to the continuance? I don't—

MR. MOORE: I am the attorney, your Honor—

[fol. 21] THE COURT: I know you are the attorney.

MR. MOORE: —the attorney had needed time to prepart and the defendant, personally, objected.

THE COURT: He personally objected?

MR. MOORE: Yes, he personally objected.

THE COURT: Fine, then that clears it up. It didn't seem to make sense.

Then, again, on May 10, 1965, I note that the trial was continued because counsel for Bosby and Harrington and Rhone were all engaged in trial. It was continued to June 14; it was on that date that it was transferred to this department.

The motion will be denied.

MR. WALTON: Your Honor, may we have a motion to exclude all witnesses other than those testifying?

THE COURT: Yes, that motion will be granted.

Are there any witnesses in the courtroom?

MR. WARNBERG: Yes, your Honor, I believe they are all here.

Maybe I should call them off, if I may. May I do that, your Honor ?

THE COURT: Go ahead.

(Whereupon the Deputy District Attorney Warnberg called the names of witnesses in the herein proceedings.)

MR. WARNBERG: All right, your Honor, they are all here.

[fol. 22] THE COURT: All witnesses in this matter will remain outside until you are called to testify. Once having testified in the case, you will not discuss your testimony with any other witness.

MR. WARNBERG: Two of them are not here yet, your Honor, but when I get them here I will have your Honor order them.

THE COURT: Gentlemen, the other day I asked you whether or not you could stipulate that the admonition which I gave to the jury on Thursday with respect to discussing the case and forming an opinion with respect to the case, if it might be stipulated that that admonition is deemed to have been given to the jury prior to the taking of all recesses.

May it be so stipulated, Mr. Rosen?

MR. ROSEN: Yes, your Honor.

THE COURT: Mr. Moore?

MR. MOORE: Yes, sir.

THE COURT: Mr. Walton?

MR. WALTON: Stipulated.

THE COURT: Mr. Gordon?

MR. GORDON: So stipulated, your Honor.

THE COURT: Mr. Warnberg?

MR. WARNBERG: Yes, your Honor, so stipulated.

THE COURT: All right, bring the jury in, please.

[fol. 23] (The following proceedings were had in open court, within the presence of the jury:)

THE COURT: Good morning, ladies and gentlemen. You may call your first witness, Mr. Warnberg.

MR. WARNBER: Yes, your Honor.

May we call as our first witness Dr. Kiernan, the autopsy surgeon, your Honor.

THE BAILIFF: Raise your right hand, please, and face the clerk.

THE CLERK: You do solemnly swear the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth, nothing but the truth, so help you God?

THE WITNESS: I do.

* * * *

[Testimony of Dr. Earl R. Kiernan—omitted in printing]

[fol. 36] Your Honor, we then call Mrs. Robbins.

THE COURT: Ladies and gentlemen, I just wanted to inform you of something that you have probably seen, but just to make it easier for you, so you understand what is going on, you probably noticed that we have two reporters in this case, one sits here for about ten or fifteen minutes, then he goes out and the other one comes back in.

[fol. 37] The reason for that is that the Court and each of counsel are provided with a daily transcript of the proceedings; so, that is the reason for the two reporters.

THE BAILIFF: Raise your right hand, please, and face the Clerk.

THE CLERK: You do solemnly swear the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

ARDIS ALLISON ROBBINS,

called as a witness by and on behalf of the People, having been first duly sworn, testified as follows:

THE CLERK: Be seated and state your name, please.
THE WITNESS: Ardis Allison Robbins.
THE CLERK: Your first name?
THE WITNESS: A-r-d-i-s.
THE CLERK: And your last name?
THE WITNESS: R-o-b-b-i-n-s.

DIRECT EXAMINATION

BY MR. WARNBERG:

Q Mrs. Robbins, is that correct?
A Right.
Q Last December the 11th, 1964, were you operating [fol. 38] a grocery store?
A Grocery and liquor.
Q Where was it located?
A 6126 Holmes Avenue, L.A. 1.
Q Is that over in the Florence area?

A Yes.
Q And just briefly is it a typical grocery-liquor store?
A Mm-hmm.
Q And were you there that day?
A Yes, sir.
Q 2:00 to 2:30 that afternoon, were you there?
A Yes, sir.
Q Was anyone there with you at the time?
A My brother and my clerk, Benjamin Serna.
Q Who was your brother?
A Darrell Ashcraft, A-s-h-c-r-a-f-t, D-a-r-r-e-l-l.
Q Was he an employee there?
A Yes, sir.
Q And Mr. Serna, the deceased in this case?
A Yes, sir.
Q He was an employee or what?
A An employee, yes.
Q Just briefly what was he doing for you there?
A Oh, clerking and stocking up and cleaning up.
Q Now, some time between, oh, 2:00 to 2:30 that [fol. 39] afternoon, did someone ask you to cash a check for them?
A Yes, sir.
Q About what time was that?
A I think it was about 2:15.
Q P. m?
A Yes, sir.
Q In the daytime?
A Yes.
Q During the business hours?
A Yes.
Q Now, how many people were there at that time?
A Three.
Q Where were you standing?
A I was behind my counter.
Q Where was that located, can you tell us?
A Well, I think it is about ten feet from the front doorway, which is on the west side of my store.
Q And were you there alone at the time?
A No, my brother was behind the counter.
Q Mr. Ashcraft?

A Yes.
Q Is there a cash register right there?
A Yes, there is two.
Q In your business do you cash checks?
A Yes, sir.
Q In the normal course of business?
[fol. 40] A Yes, sir.
Q Had you noticed those individuals before that?
A I had noticed a redheaded one crossing the street, coming towards the store.
Q Can you look out—
A Yes.
Q —through the store?
A Uh-huh, across Holmes Avenue.
Q Where was that redheaded one then?
A I noticed he and one other, I don't know which one it was, coming east towards my store and then they went on south.
Q Do you know now who the redheaded one is?
A Yes, sir.
Q Who is that person?
A Mr. Harrington.
Q That is the Defendant Harrington in this case?
A Yes, sir.
Q In other words, at that time he had red hair?
A Yes.
Q And where was he walking, in what direction?
A East.
Q Is that towards the store or—
A Yes, sir.
Q And do you now know who the other person is that was with him?
[fol. 41] A I am not sure of that. I just noticed red hair in the sunlight.
Q I see. Now, what is the next thing that you noticed? Were you standing by the cash register?
[fol. 42] A Yes. Well, then two of them come in, Mr. Bosby and Mr. Cooper.
Q Now, you are identifying Defendant Bosby in this case?
A Yes.

Q And Defendant Cooper?
A Yes.
Q In other words, where were they standing.
A They just came in and Bosby went on back to the ice box or the walk-in box, which is in the east end of my store, and Cooper came over and asked if he could cash a check.
Q In other words, you were standing by the register?
A Uh-huh.
Q Did Defendant Cooper come over directly to you?
A Yes, sir.
Q And I take it he talked to you?
A Yes.
Q In other words, who was there then, you and the defendant Cooper?
A And my brother, Mr. Ashcraft, and Ben was over in the southwest part of the store.
Q Is that somewheres in relation to where the defendant Bosby walked?
A No.
Q A different area?
[fol. 43] A Uh-huh.
Q Now, what did Defendant Cooper say to you?
A He wanted to know if he could cash a check, a payroll check.
Q Well, in other words, what did he say?
A "Could I get a payroll check cashed?"
Q And what did you say?
A "I will look at it."
Q I didn't hear you.
A "I will look at it."
Q You will look at it?
A Uh-huh.
Q Did you? Did you look?
A He reached in his pocket to get the check and it wasn't there and he said he must have left it in the car, so he went out.
Q In other words, you didn't see it then?
A No, not at that time.
Q Anything else that happened or anything else said right there?

A No, not then.
Q All right.
Now, when Defendant Cooper was talking to you about the check did you notice where Defendant Bosby was?
A I can't see that from where I stand, but I knew he was back at the walk-in box. I thought he was hunt-
[fol. 44] ing for some kind of beer.
Q And had you noticed then Defendant Harrington, the redhead?
A No, they hadn't come in yet.
Q I take it then Cooper left?
A Yes.
Q You stayed at the—where did you stand?
A I just stayed where I was, behind the register.
Q And the other defendant, Bosby?
A He was still back at the box.
Q All right, then what happened?
A Then when Mr. Cooper came back in, why, then Mr. Harrington and Mr. Rhone came in behind him.
Q All right. Now, you have identified the other defendant—
A Yes.
Q —Defendant Rhone?
A Yes.
Q Cooper, Harrington and Rhone came in?
A Yes.
Q Where did they go?
A Mr. Rhone and Mr. Harrington stayed by the sundries, at the rack, which is in the front of the store.
Q All right, what did Cooper do?
A He came over with his check and—
Q All right, go ahead.
[fol. 45] A I was just—so he drew out his driver's license.
Q First did he show you the check?
A Yes.
Q In other words, where are you standing now; at the cash register or where?
A Yes, still there.
Q Is that where you cash your checks?
A Yes.

Q And did you notice where Defendant Bosby was then?

A He was still back in the back.

Q Now, what did defendant—did Defendant Cooper talk to you?

A Yes, he said I had cashed several of his checks before and, as I recollect, I don't believe he had been in my store for a couple of years.

Q In other words, did you recognize him as—

A I had seen him before, yes. I knew him.

Q Was this on a Friday?

A Yes.

Q Is that one of your check cashing days?

A One of the big ones, yes.

Q Did he give you the check?

A Yes, he handed it to me and I looked at it and I knew it was a good check. I had cashed this company's checks before, but, I don't know, there was something about the way Mr. Rhone looked or something, I knew [fol. 46] I wasn't going to open that box.

Q All right, where was Rhone then?

A He was still at the sundry rack behind Mr. Harrington.

Q Rhone and Harrington were behind the sundry rack?

A They were in front of it, yes.

Q Is that somewheres near that cash register?

A It is across the aisle and in front.

Q All right.

So then what did you say or do, if anything?

A Well, the driver's license was real dilapidated looking and stuff—the driver's license was real dilapidated looking, so I just didn't want to cash the check.

Q In other words, Cooper then gave you a driver's license, also?

A Yes, sir.

Q He gave you that at the same time he gave you the check?

A No, he gave me the check first and then pulled out his driver's license.

Q Did you ask for it?

A I said, "Do you have any identification?"

Q All right.

Then you looked at the driver's license?

A Uh-huh.

[fol. 47] Q Then what did you do?

A And then Mr. Serna was straightening some papers up in front and then he came down the south aisle and through the center and was coming towards the cash register, I believe, when Mr. Bosby came from the east and they collided in the middle of the floor and they both went down.

[fol. 48] Q Were you watching this at any time?

A No, I was kind of looking out the front. And then I thought they had just collided. And they knocked the potato chip rack down.

And then I looked around and Benjamin Serna got up and went towards the east end of the store and Mr. Bosby followed him and—

Q Now, all right. In other words, I take it, then, you are still at the cash register?

A Yes, sir.

Q And up to this time had you noticed anything in Bosby's hand?

A No, not then.

Q All right. And had you noticed anything in the hands of any of the other defendants up to this time?

A No.

Q And the other three defendants—well, Cooper is right there with you at the cash register?

A Yes.

Q And the other two defendants are near the sundry rack?

A Yes.

Q And defendant Bosby and Serna are walking from the—did you call it th walk-in?

A The middle of the floor back towards the walk-in. Benjamin was in front and Bosby behind him.

[fol. 49] Q Now, in the meantime are you talking to defendant Cooper?

A No. After—when they went down on the floor, why, then that upset me and I didn't know what really

had happened. But I was more or less trying to watch Ben.

Q Mr. Serna?

A Yes.

Q All right, now tell us what happened.

A And so then Ben came through the little opening near the walk-in and came up the aisle towards me. And then Mr. Bosby pulled him by the left shoulder, I believe it was, and turned him around. And I can't remember his exact words, but it was "Man" something.

Q In other words, you heard some words?

A Yes.

Q You can't tell us what they were?

A No, I can't remember right now. I think I did beforehand, but I don't remember it right now what it was.

Q All right. The best you remember, can you tell us the words to the effect of what?

A "Man, I told you to take it easy," or something. I don't know exactly.

Q All right. Now go ahead and then tell us what happened.

A And so then I noticed the gun, and that's when I went for my gun.

[fol. 50] Q All right. This is the first time you noticed a gun?

A Yes. It was right up against Ben's chest.

Q Who had the gun?

A Mr. Bosby.

Q That is, the defendant Bosby, where they were over here in the aisle?

A Yes, right in the same aisle as I was, only behind the delicatessen case.

Q Is that after you heard those words stated by the defendant Bosby that you noticed the gun?

A Yess, yes, uh-huh.

Q And how far apart would you say the defendant Bosby and Mr. Serna were right then?

A Right up against them. There isn't any more aisle than from here to here, this and the seat to there, however much distance that is.

THE COURT: She is indicating about two feet.

THE WITNESS: Two to three feet.

Q BY MR. WARNBERG: In other words, they are standing in the aisle of the grocery, is that it, one of the aisles?

A Well, it's the aisle behind the deli. It's the same as the distance between the cash register and the liquor department.

Q All right, they were facing each other?

[fol. 51] A Yes.

Q What did you do?

A I went for my gun.

Q Go ahead.

A It was under the cash register. And I forgot about the other fellows when I saw Ben's life in danger.

MR. WALTON: Move that be stricken as being a conclusion of the witness.

THE COURT: It may go out; the jury is admonished to disregard the statement.

Q BY MR. WARNBERG: Just tell us what happened, not what you thought. In other words, at that time you were standing at the cash register?

A Uh-huh.

Q Who was there; Cooper?

A Mr. Rhone was the one who grabbed my arm.

Q In other words, I take it about the same time you grabbed for your gun?

A Uh-huh.

Q That was in the drawer?

A It was in a drawer under the cash register.

Q All right, you grabbed for it. Describe what happened.

A Well, Mr. Rhone grabbed my arm, and I believe it was Mr. Cooper took the gun out of my hand, because Mr. Harrington had moved over by the freezer, which is about [fol. 52] six to eight feet from the sundry rack.

Q And did you notice anything in any of the hands of the other three defendants?

A No, not then.

Q All right. Now, Cooper, you say, grabbed your gun?

A I believe he was the one who took it out of my hand, but Mr. Rhone had me by the wrist.

Q Were you still standing there by the cash register?
A Yes. He just leaned across the counter and grabbed my wrist.
Q Anything said? Anybody say anything at that time?
A No. And then the shot rang out and—
Q Where did the shot ring out?
A From behind the delicatessen case.
Q Is that where the defendant Bosby and Serna were located?
A Yes, sir.
Q This happened very suddenly, I take it?
A Very suddenly.
Q Very fast. And then what did you do then?
A And then Mr. Bosby said, "Everybody to the back." And so—
Q All right. My question really is this: when you heard the shot, what did you do? Did you look over there?
[fol. 53] A Yes. I was already looking that way, anyway.
Q Did you actually see the shot fired?
A Yes, sir.
Q Oh, I see. What did you see?
A Pardon?
Q What did you see? In other words, you haven't told us yet what you saw. You heard the shot fired, but you now say that you actually were looking there?
A Yes.
Q Well, who—
A So Ben turned towards me and was coming towards me, and I noticed the blood running out of the left corner of his mouth.
And so I said, "Oh, Benny." And I knew he needed a doctor.
So I was going east towards my house, which is in the rear of my apartment, just in the rear—
Q Now, all right. All I want to know is, who shot Mr. Serna?
A Mr. Bosby.
Q That you saw?
A Yes.

Q Were they in that position you have heretofore described, just about two feet apart?

A Yes, sir.

Q Did you hear anything said just as the shot was [fol. 54] fired?

A No.

Q Or just before that?

A No.

THE COURT: Speak out loud, please, ma'am.

THE WITNESS: Yes, sir. I didn't hear any words then.

Q By MR. WARNBERG: No words?

A Except that "Everybody to the back."

Q That is after the shot was fired?

A Uh-huh.

Q And then right after the shot was fired, Mr. Serna started walking towards you?

A Yes.

Q And where was your gun then?

A Mr. Cooper, I guess, had it.

Q All right. And then as Mr. Serna was walking towards you, were any words said?

A No, I just noticed the big spot of blood on his shirt and the blood coming out of his mouth.

Q Did you notice Defendant Bosby, what he did?

A No, he was just kind of waving his gun and saying, "Everybody to the back."

And then one of the other fellows repeated it from out here.

Q Were the other three defendants then right by you at the cash register?

[fol. 55] A No. Well, they were—Mr. Harrington was still by the—right in front of the cash register, only across the aisle near the freezer.

Q And had you noticed anything in their hands then?

A Not until I turned to go, and then I saw one—I believe it was a gun in Mr. Harrington's hand.

Q All right.

A And I knew Mr. Cooper or one of them had mine, so—

Q All right.

A —I know that there were three guns there then.

Q So what did you do then?

A I ran towards—after I walked past Ben and Mr. Bosby, I ran out the front door and ran to my next door neighbor and they weren't home. And I ran to the next one and asked them to call an ambulance and the police.

Q All right. In other words, you ran out of the store?

A Yes.

Q And before you ran out of the store, were there any other words that you heard between any of the parties?

A No.

Q Now, during all this time was there anyone else in the store besides you and your brother, as far as you remember, and Mr. Serna?

A I don't believe there was.

Q And the four defendants?

[fol. 56] A No, I don't believe there was.

Q Now, how long were you gone? After you called the police did you come back?

A Yes, sir.

Q About how long did that take?

A Well, I suppose maybe seven or eight minutes.

Q Then you came back to the store?

A Yes, sir.

Q And were the defendants there?

A No.

Q Did you notice how they left?

A No, sir.

Q What was the condition when you came back? Who did you see?

A Mr. Serna was lying there in a pool of blood and my brother was looking for me. He didn't know where I had gone and I didn't know where he had gone. I didn't know what had happened to him, either.

Q And I take it then you stayed there?

A Yes, until—

Q And the officers arrived some time later?

A Yes.

Q About how much later?

A Very shortly after I came around in the front of the store. And there was quite a crowd gathered.

Q Had the body of Mr. Serna been moved until the [fol. 57] officers got there?

A No.

Q Let me show you People's Exhibit 2 for identification, and I will just ask you to take a quick look. Does that fairly represent Mr. Serna as you saw him there at that time?

A Yes.

Q Now, I have one more. I notice there appears to be some kind of an ice box to the right of that body, is that correct?

A This is the delicatessen—

Q I'm going to stand over here so you will speak up loud.

A This is the delicatessen case. This is the aisle where it happened.

THE COURT: It will be marked People's 3 for identification.

MR. WARNBERG: Thank you, your Honor. May I mark a 3 on there, your Honor.

THE COURT: All right.

Q BY MR. WARNBERG: Did you then go back to your cash register and examine it?

A No. The police—I just stayed out in front until the policemen came. And then later they were asking me how it happened and stuff, and then—

Q Don't tell us what you said. But did you eventually [fol. 58] check your cash register, go over there and take a look at it?

A Yes.

Q What condition did you find it in then?

A The main cash register was jammed and we couldn't open it.

Q What do you mean by that?

A In the deal of taking my gun, they had knocked the electric cord out and it wouldn't open.

Q In other words—

A The power was gone.

Q There is some plug that hooks into the electricity, is that it?

A Yes.

Q So that you couldn't open it then, is that correct?
A No.
Q Was it in that condition before the defendants entered?
A No.
Q And you had money in the cash register?
A Yes, sir.
Q Going back to that check, can you describe it for us?
A Yes. It was a green and white Gaffers & Satlers check.
[fol. 59] Q Was that a check that you recognized?
A Yes.
Q The company—
A Yes.
Q And the area?
MR. WARNBERG: I have a diagram, your Honor. It may be a little helpful in this case.
Would you rather take a recess first and then I will put it on the board, maybe we can stipulate to it?
THE COURT: You haven't put it on yet, you say?
MR. WARNBERG: No, I haven't your Honor, but I could do it during the recess, if it is satisfactory.
THE COURT: We will take a recess at this time, ladies and gentlemen; ten minutes.

(Recess.)

[fol.60] THE COURT: You are still under oath. Will you please state your name for the record, please.
THE WITNESS: Ardis Allison Robbins.
Q BY MR. WARNBERG: Mrs. Robbins, we have a diagram on the board which I believe depicts in diagram form your store at that time.
THE COURT: It will be marked People's 4 for identification.
MR. WARNBERG: Thank you. May it be marked?
Q Now, People's 4 depicts an entrance, I believe, on the west side. Does your store face west?
A Yes.
Q On Holmes Avenue?
A Uh-huh.

Q Here is a picture of what I believe is the outside appearance of the store.

Do you recognize it?

A Yes, sir.

MR. WARNBERG: May it be marked, your Honor, People's 5 for identification?

THE COURT: It will be so marked.

Q BY MR. WARNBERG: Does People's 5 fairly represent your store as it existed on December the 11th, 1964?

A Yes, sir.

Q Now, in other words, the screen door and this door as depicted on People's 4—

[fol. 61] May I mark just a "4" there, your Honor?

THE COURT: Yes, sir.

Q BY MR. WARNBERG: —indicates an entrance on the west side, is that correct?

A Yes. It is a double screen door, the one a little larger than the other.

Q Now, could you go to the board, to the map, and place an X at the location where you were when your gun was grabbed from you?

May I, your Honor, have her pick up one of the crayons on the board?

THE COURT: Yes.

Q BY MR. WARNBERG: And indicate now by an X your location. First, are you familiar with the diagram?

A Yes.

Q Now, you're going to have to speak loud now because you are standing away from the microphone.

A All right, I'll try. This is what I described as the sundry rack.

Q Speak as loud as you can now.

MR. WALTON: Your Honor, excuse me. Could I ask the bailiff to see if it will fit in the corner there? My view of this is none too good and the defendants can't see it at all.

THE COURT: All right, we will try to do it.

THE WITNESS: Here is the—this is the under coun-

[fol. 62] ter cash register where I cash the checks.

Q BY MR. WARNBERG: I notice there is an area called cash register.

A This is my main cash register where I take in my daily take.

Q All right.

A And this is the money order and a check cashing register underneath this counter.

Q In other words, you cash the checks at an area called the candy case?

A Right here. The candy case is down below. There is a counter top on top.

Q All right. Now, where were you standing when the gun was grabbed from you?

A Between here and—between this register and this one.

Q All right. Now place an X there approximately—

A Approximately right here.

Q Make it large so we can see it.

Now, your Honor, may I draw a line out from that and call that R-1?

THE COURT: You may.

MR. WARNBERG: Thank you.

Q Now, when you were standing at R-1 and when the gun was grabbed from you, where was it that you saw defendant Bosby shoot Mr. Cerna?

[fol. 63] A Right here. It was about in the middle of this register—I mean, refrigerator.

Q All right, now, would you indicate that by an X.

All right. Your Honor, may I draw a line out from that and call that R-2?

THE COURT: You may.

Q BY MR. WARNBERG: Does R-2 then fairly depict the area where Defendant Bosby and Mr. Cerna were?

A Yes, sir.

Q Now, can you indicate by three more Xs where the other defendants were right at that moment?

A Mr. Harrington was right in here.

THE COURT: Just mark with an "H." It will be a lot easier.

THE WITNESS: H.

MR. WARNBERG: Thank you.
MR. GORDON: Who was there? I couldn't hear.
THE WITNESS: Harrington.
THE COURT: Harrington.
Q BY MR. WARNBERG: And Mr. Cooper and Mr. Rhone?
A I believe Cooper was over here.
THE COURT: Mark that with a "C," please.
THE WITNESS: Near the door somewhere here. And Mr. Rhone was right in here somewhere until he moved up and grabbed the gun.
THE COURT: Keep your voice up, please, ma'am.
[fol. 64] THE WITNESS: Mr. Rhone was here until he moved up and grabbed the gun.
THE COURT: Thank you.
Q BY MR. WARNBERG: All right. I believe you may take the witness stand.
Now, when Mr. Harrington was standing at position H, is that when you saw the gun in his hand?
MR. WALTON: Object to that as assuming facts—well, I will withdraw it.
Q BY MR. WARNBERG: You may answer.
A I didn't see that until we started towards the back, after they had ordered us to the back.
Q Where was Mr. Harrington then?
A He was right in—almost where he was, except he just had the gun out.
Q Approximately at position H?
A Uh-huh.
Q Now, can you describe that gun you saw in his hand?
A No, sir.
MR. WARNBERG: May I have the bailiff for just one moment, your Honor? I have two—
Q What was the type of gun that you had that was taken from you at the time?
A I really don't know. It was my husband's.
Q Well, let me show you two weapons, and I will ask [fol. 65] you if you can—
A This is my husband's (indicating).

Q You are now referring to this, shall I call it, revolver?

A He had taped this down for me.

Q You recognize it by the tape around it?

A Uh-huh.

MR. WARNBERG: May it be marked People's 5, your Honor?

THE COURT: 6, please.

MR. WARNBERG: Oh, I'm sorry, thank you; 6.

Q And I will show you one more revolver. Does that look like the gun Defendant Harrington had?

MR. WALTON: Object to that, your Honor—

THE WITNESS: I don't know.

MR. WALTON: —no foundation.

THE COURT: Objection sustained. The answer may go out.

MR. WARNBERG: May it be merely marked for idenentification at this time, your Honor, People's 7?

THE COURT: 7 for identification.

Q BY MR. WARNBERG: This all happened here in Los Angeles County at your store?

A Yes.

Q Did you recognize as having seen any of the other three defendants at any previous time?

A No.

[fol. 66] MR. WARNBERG: Counsel, just a few more pictures.

Q Let me show you one more picture. It appears to be a counter. Do you recognize the picture?

A Yes.

Q Does that picture fairly represent the area where you were standing when the gun was taken from you?

A Yes, just about here, between this register and this under counter one.

[fol. 67] Q In other words, this picture fairly represents the area R-2 as it is indicated on the diagram?

A R-2?

Q I am sorry, R-1.

A R-1, yes.

MR. WARNBERG: May the picture, your Honor, be marked People's Exhibit 8 for identification?

THE COURT: It will be so marked.

MR. WARNBERG: Thank you.

Cross examine.

THE COURT: Before you cross examine, gentlemen, let me just ask one or two questions:

Do you see any of those that you have mentioned in the courtroom today?

THE WITNESS: Yes, sir, all four.

THE COURT: All right, which one is the Defendant Bosby?

THE WITNESS: The one on—is this the west end here? The left end.

THE COURT: This is west.

THE WITNESS: The left end.

THE COURT: The one farthest to the left?

THE WITNESS: Yes.

THE COURT: Which one is the Defendant Rhone?

THE WITNESS: The one on the far right.

THE COURT: All right and which one is the Defend-
[fol. 68] ant Harrington?

THE WITNESS: The one next to Mr. Rhone.

THE COURT: And which one is the Defendant Cooper?

THE WITNESS: The second one to the left.

THE COURT: All right, you may cross examine, Mr. Rosen.

CROSS EXAMINATION

BY MR. ROSEN:

Q Mrs. Robbins, your store on Holmes is about 40 feet from east to west; is that right?

A I should imagine, yes.

Q And about 19 feet from north to south?

A Yes, I believe there is a cage on the north end for bottles and stuff.

Q I am talking about wall to wall.

A Wall to wall, I should imagine 20, 19 to 20 feet.

Q And, as depicted on the diagram here, People's 4, it is rather congested with counters and stands?

A Yes, it is a very small store.

Q It is a small store, a lot of things all the way through the store?

A Right.

Q All right.

Now, when you say you first saw Bosby enter the store you told us that he went to the cooler on the east side of [fol. 69] the store; is that right?

A Yes.

Q And where was Mr. Serna at this time?

A He was over here straightening papers on the top shelf.

Q That would be in the southwest corner?

A Yes, sir.

Q All right, you may resume your seat.

Then you told us about Cooper asking about a check and then leaving the store and coming back?

A Yes, sir.

Q And when he came back, Cooper came back, was Bosby still over by the cooler and Serna still over at the southwest corner?

A Yes.

Q Then you engaged Cooper in some kind of a discussion with regard to the cashing of the check; is that right?

A Right, sir.

Q Now, then, you told us that you saw a collision between Bosby and Serna?

A Yes.

Q Would you point out where this collision occurred?

A Mr. Serna came back down this aisle and was coming over this way.

[fol. 70] Q All right.

A And Mr. Bosby moved up from here.

Q Might I—

A And they hit this potato chip rack here.

Q You are indicating that Serna came from the southwest corner, south, he was walking in an easterly direction—

A And then south.

Q —to an aisleway, and then north?

A Cutting north.

Q And that Bosby walked directly west from the cooler which is at the east side?

A Yes.

Q And they collided?

A Down in this area right here, because this rack all came down on the floor.

Q All right.

Now, there was a nut rack—

A Well, the nut rack is right on the end of this potato chip rack.

Q Next to the—

A There are shelves.

Q Let me ask a question so we can get it straight for the record—next to the refrigerator which is depicted here and just to the south of it was a nut rack which was standing; is that right?

[fol. 71] A Mm-hmm.

Q And when Cooper—strike that—when Bosby and Serna collided the nut rack fell down?

A Yes.

Q You might take your seat for a minute.

Up until this time you had not seen a gun in the hand of Bosby, had you?

A No, sir.

Q Did you see the collision?

A I said I was looking more out the front and then I heard this and I saw the nut rack go all down.

Q As far as you know, it was an accidental collision?

A I thought they had collided.

Q All right, and was there a wine bottle that was broken?

A Yes, sir, there was; I don't know where that wine bottle came from.

Q Where do you normally keep the wine?

A The wine is on the north side directly back of that marked R-2.

Q Did the wine bottle break at the time of the collision?

A There may have been one on top of that refrigerator that, you know, some of it spoiled and stuff, I sit up there for the salesman to pick up.

[fol. 72] Q You don't know, yourself, where that wine bottle came from?

A No, sir.

Q You don't know whether it was thrown by either of those two people or by anybody in that store?

A I don't believe it was thrown.

Q But you don't know that, do you?

A No, sir.

Q Were there any other bottles broken?

A No, not that I know of.

Q Now, right next to this nut rack, you say, there was a potato chip rack?

A The nut rack is on the south side; it is just hanging onto the potato chip rack. It has just got little clips that hang onto it.

Q Is that a tall rack that stands on the floor?

A It is on rollers.

Q Standing on the floor?

A Yes.

Q All right.

When Serna and Bosby collided both fell to the floor; is that right?

A Right.

Q Now, you didn't hear anything said between the two people at this time?

A I did not.

[fol. 73] Q Did you see Serna get up?

A Yes, sir.

Q He was up first?

A Yes.

Q After he got up I take it Bosby got up?

A Yes.

Q Did you see Bosby get up?

A No, I was just watching them go to the back.

Q Did you see any guns in the hands of anybody up to this time?

A No.

Q Had anybody said to you, "This is a robbery"?

A No.

Q "Give me your money"?

A No, sir.

Q As a matter of fact, nobody said that to you at any time?

A That's right.

[fol. 74] Q All right, you saw Ben Serna get up off the floor there in the aisleway after the collision and he went in which direction?

A East.

Q How far east did he go?

A He went about to the cooler and cut through this little aisle here and came right on through here.

Q You are indicating that he went down the center aisle east to the cooler?

A Yes.

Q He went north?

A Mm-hmm, and then west again.

Q And then west?

A Mm-hmm.

Q To about where?

A Well, about in here.

Q Where you drew the X?

A Yes.

THE COURT: Where a line is drawn to R-2.

MR. ROSEN: Yes.

Q Now, when Serna got up and walked where you told us that he walked, did you see Bosby get up and walk in the same direction?

A He was right behind Mr. Serna.

Q He was behind Serna?

A (Witness nods head.)

[fol. 75] THE COURT: Answer out loud; you can't nod your head, ma'am, I am sorry.

THE WITNESS: He was right behind Mr. Serna, yes.

Q BY MR. ROSEN: Well, did Serna stop where—a point that you indicated with the X?

A Mr. Bosby grabbed him by the shoulder and turned him around and said, "Man, I told you not to give me any trouble."

Q Is this at the point of X that you have indicated?

A Yes.

Q What were these other fellows doing at this time?

A I was watching Mr. Serna, I wasn't paying attention to them.

Q Is it at that point that you say you saw a gun in the hand of Bosby?

A When he turned him around, yes, and shoved the gun right against his chest.

Q Well, you were standing—where you have indicated the X, just north of the candy case; is that right?

A That's right.

Q At this time?

A Yes.

Q Now, how high is this refrigerator; how high does it stand off the floor?

[fol. 76] A Probably four or five feet.

Q Four or five feet?

A Yes.

Q Well, the corner of the refrigerator—

A It doesn't project.

Q Just a minute, let me finish the question—obstructed your view, did it not, from what was happening back here in the center part of the refrigerator?

A No, sir.

Q It did not?

A No, sir, it isn't that—

Q Incidentally, when Serna finally fell after being shot, he fell over here by the sink, didn't he?

A No—no, not hear this sink, it was right—well, I can show you better, I guess.

Q All right.

A I didn't see him fall because after I saw this blood coming out of his mouth, it was dripping down this end of the refrigerator here.

THE COURT: Keey your voice up.

THE WITNESS: That is when I said, "Oh, Benny," and that is when Bosby said, "Everybody to the back," and so I went back to—

Q BY MR. ROSEN: You were going to show us where Serna fell.

A Right here, but he fell right in here.

[fol. 77] Q Would you draw another X where he fell, please.

A Well, his feet were kind of in here somewhere, I think, when I saw him—

THE COURT: I can't hear you, Mrs. Robbins, I'm sorry. I know it is difficult for you back there in the corner, but we have to make a complete record.

THE WITNESS: His feet were here and his head was somewhere in here when I—

Q BY MR. ROSEN: When you saw him?

A After I saw him.

Q Would you make an X there where his head was?

A Right in here.

MR. ROSEN: Your Honor, may this be indicated?

THE COURT: Why don't you just draw a line out and put "head," Mr. Rosen, please, if you will do that?

MR. ROSEN: "Head (S)", your Honor, indicating "Serna."

THE COURT: And would you also put an X, ma'am, where his feet were, and also draw a line out there, too, Mr. Rosen?

MR. ROSEN: Well, of course, you have indicated the same X for the head and the feet.

THE WITNESS: I am sorry.

THE COURT: In order to clarify the record, also, Mr. Rosen, you were testifying, Mrs. Robbins, before, when you were talking about where you saw the blood dripping [fol. 78] from his mouth, you were talking about the northeast corner of the refrigerator; is that correct?

THE WITNESS: Northwest.

THE COURT: I mean northwest corner of the refrigerator.

THE WITNESS: Uh-huh.

THE COURT: Thank you very much.

Q BY MR. ROSEN: Now then, Mrs. Robbins, you say that you could see what was happening between Serna and Bosby at the time the shot went off?

A Yes, sir.

THE COURT: You may be seated, Mrs. Robbins.

Q BY MR. ROSEN: Well, did you step back from the candy case in order to be able to see that?

A No, I was a little bit back of it.

THE COURT: Ma'am, would you please, instead of turning to Mr. Rosen to answer the question, talk into the mike? Thank you.

THE WITNESS: I was a little bit back of the counter. The aisles are not very large.

Q BY MR. ROSEN: Well, the fact is that you heard what sounded like a shot and you just assumed that it was Bosby who shot Serna; isn't that right?

A No, I saw them.

Q Now, Mrs. Robbins, this diagram, as it says right here, is on a scale of one inch equalling one foot.

Now, using a ruler here to measure this, it would ap-
[fol. 79] pear to be about two feet from the west corner of the refrigerator to the north shelf.

A Mm-hmm.

Q An aisleway of about two feet; does that sound about correct?

A On this end?

Q Yes.

A It is on an angle.

Q Yes, just the way it is depicted in the diagram, People's 4?

A Mm-hmm.

THE COURT: Please answer yes or no, ma'am.

THE WITNESS: Yes, sir.

THE COURT: Thank you.

[fol. 80] Q BY MR. ROSEN: And you say that this refrigerator is about four or five feet high?

A Yes, sir.

Q Closer to five than four, would you say?

A I can well see over it and I'm five foot two.

Q Did it come up to about your chin, the top of it?

A No, even lower than that. I have on high heels.

Q At the time that you heard this shot you had already reached for your own gun, isn't that true?

A Yes, sir.

Q This was before you heard the shot that you had reached for your own gun?

A Right.

Q All right, now, when you reached for your own gun—

A Uh-huh.

Q —one of those other two men who were standing in front of you, in front of the counter, reached over and grabbed your arm, didn't he?

A Uh-huh.

Q Isn't that right?

A Right.

Q This is before the shot that you heard fired?

A Right.

Q And when that person reached over and grabbed your arm, you were standing right against that counter, [fol. 81] weren't you?

A No, I was not.

Q Now, how far back from the counter were you standing at that point?

A A foot, probably.

Q A foot. Well, when he reached over and grabbed that gun, or grabbed your arm which had the gun, didn't he pull you forward a little bit?

A Yes.

Q Right against the counter?

A He turned me as I—

Q He turned you?

A Uh-huh.

Q Pulling you forward against the counter, isn't that right?

A And a little to the east.

Q All right. And then another man took that gun from your hand?

A Right.

Q Now, at this time your attention was entirely directed at this gun that you had and these two men who were taking that gun from you, wasn't it?

A Right at that moment.

Q And that's when that shot went off, wasn't it?

A No.

Q It wasn't?

[fol. 82] A No.

Q How long after that did the shot go off?

A Heavens, it was very shortly.

Q A matter of a few seconds?

A Uh-huh. I can't remember exactly whether they said to the back then or not. But a shot had rung out and it had ricochetted up into the, oh, ballistrade, the venetian blinds. And one neighbor—there was a little piece of metal on the west end counter—

MR. WALTON: Your Honor, I move this all be stricken—

THE WITNESS: —and don't touch it—

THE COURT: Just a moment.

MR. WALTON: It is an answer without a question.

THE COURT: The last part of the witness's statement may be excluded, the jury is admonished to disregard it.

Q BY MR. ROSEN: Mrs. Robbins, when you reached for that gun and that gun was taken from you, at that moment you weren't paying attention to what was happening between Cerna and Bosby, were you?

A I turned and I was still looking at Ben.

Q Do you mean that you still at this point had in your mind, "I've got to see what's happening to Ben"?

A Yes. He was a real good worker, honest, and—

Q At the time that you reached for your gun and these two other men disarmed you, you were thinking about what's happening to Ben? Is that what you are telling us?

[fol. 83] A Yes. I didn't—they just took my gun and I knew I couldn't do anything.

Q And it was almost momentarily after you were disarmed, the gun was taken from you, that you heard this shot?

A Yes, pretty soon after.

Q I'm going to ask you the question again.

You didn't actually see the gun fired, you just heard a shot and believed that what happened is what you have told us, isn't that right?

A No, sir.

MR. ROSEN: All right. I have nothing further.

THE COURT: Mr. Moore.

CROSS EXAMINATION

BY MR. MOORE:

Q Ma'am, when Mr. Cooper walked up to the counter there, you say after he went outside he came back and handed you a check from this concern you have mentioned, is that right?

A Right.

Q And it had what name on it?

A Gaffers & Satler.

Q And what name for the individual?

A Gilbert Cooper.

Q And then did you ask for identification?

A Right.

[fol. 84] Q And then Mr. Cooper handed you a driver's license, is that right?

A Right.

Q And you looked at the photograph on the driver's license and it appeared to be Mr. Cooper, is that right?

A Yes.

Q You will have to answer out loud.

A Yes, sir.

Q Now, you say that Mr. Cooper looks familiar to you as a person having been in your store in the past?

A Right.

Q Now, at the time he handed you the check, however, he told you he had cashed checks there, is that right?

A Right.

Q But at that time you told him you didn't remember him?

A There was something about it, I just didn't want to cash the check.

Q I know. But at that time you didn't remember that he had been in your store on prior occasions, did you?

A Yes.

Q You did remember that?

A I did. I knew he had been in there, but I didn't really remember him cashing checks until later.

Q Right. In other words, he just looked like a person familiar to you?

[fol. 85] A Uh-huh.

Q In other words, you have a number of persons coming in and out of your store from time to time that look familiar, right?

A Yes. I know most of the ones who cash checks.

Q Right. And you have other people in the store cashing checks on occasions, that is, helping you?

A No, not at that time. My brother had actually—had just come down and was visiting, and he—

Q Pardon me. I mean, over the period before that, say a year or so before that, did you have somebody else helping you?

A My husband.

Q Your husband.

A And he passed away two years ago.

Q And then after he passed away, was there somebody else helping you there at the store?

A I cashed the checks and he ran the register.

Q Who is that?

A He is in Texas now. Mr. Orlie F. Mann.

Q Now, directing your attention to the diagram 4, where you have a "C" marked there, you have told us, I believe, that is where Mr. Cooper was standing near the door at some time, is that right?

A He was—I believe he was actually nearer that counter there, that cigar counter, than nearer the door.

[fol. 86] Q In other words, after he had given you the check and shown you his driver's license, you had given the check back to him, is that right?

A Well, it seems like when Mr. Serna and Mr. Bosby went down, it seems like they all changed places.

[fol. 87] Q But you had put the check down or given it back, is that correct, at the time?

A Yes, I told him I didn't want to cash it.

Q That is what I mean. You gave it back to him?

A Yes.

Q And it was after that that you heard the collision?

A Yes. But in the meantime Mr. Bosby had asked my brother about a bottle of Kalani wine, and he had gone down behind the deli case there to the wine rack.

Q Where was your brother at that time?

A He was at the cash register, and then he asked him, because I was busy with Mr. Cooper, so he asked him about the wine.

Q Mr. Bosby came down to the cash register?

A No, no. He came—oh, there's a toy rack here, and he was possibly in here, asking about this Kalani wine that is back here.

Q Now you are indicating right west of something there. I can't see what it is.

THE COURT: There is an area there called "Shelves," and it just south of the refrigerator there.

MR. MOORE: Yes.

THE COURT: Southeast of the refrigerator.

THE WITNESS: This is the toy rack here, and he was somewhere in here, and he was looking towards the [fol. 88] wine over here.

Q BY MR. MOORE: Was that before the collision?

A I believe it was. I'm not certain.

THE COURT: You may resume the stand, please, Mrs. Robbins.

Q BY MR. MOORE: After you told Mr. Cooper that you would not or did not desire to cash his check, he said nothing further, is that right?

A No, I don't believe he did.

Q In other words, my question was wrong, but he said nothing after that?

A Not that I remember, sir.

MR. MOORE: All right. That's all, thank you.

THE COURT: Mr. Walton.

CROSS EXAMINATION

BY MR. WALTON:

Q Mrs. Robbins, had you ever seen any other of these defendants prior to that date except for Cooper?

A No, except just, as I said before, I saw Mr. Harrington coming across the street.

Q Well, I mean prior to December 11, 1964.

A No.

Q And you hadn't seen Cooper in a couple of years, is that correct?

A Right.

[fol. 89] Q Do you make it a practice to try to commit faces to memory as a part of your check cashing operation?

A When I cash checks for them, yes.

Q Do you recall how many times you had seen Cooper in the store cashing checks?

A No. I believe he had cashed two or three checks several years ago.

Q I see. And you say you had seen Harrington earlier that day, is that right?

A No, just prior to their coming in.

Q Well, had anyone of the defendants come in the store at the time that you say you saw Harrington?

A No, I don't believe they had.

Q This would be a matter of minutes before Cooper came in with his check?

A Yes. There had just been a customer in there and she had wanted a light bulb, and I had sent Ben over there to try to find it.

Q I see. Well, now, Harrington, when you first saw him, was outside the store, is that correct?

A Yes, coming from the west towards the east across the street.

Q This was in the middle of the day, was it not?

A I don't know whether it was around noontime or not, but I know the sun was shining directly on—

Q Bright sunny day, wasn't is?

[fol. 90] A Right.

Q How long did you keep your gaze on Harrington at the time you say you saw him coming down the street?

A I don't know. This customer came in and I stopped and was waiting on her.

[fol. 91] Q You say that Harrington had red hair on the occasion you have described in your testimony; is that right?

A Right.

Q Would that be some other color than his hair presently is?

A Right.

Q In other words, his hair is not red now, is it?

A No, sir.

Q Did you take a good look at him that day?
A Yes, sir.
Q A very good look?
A I took a good look at them all when they came in.
Q You told the police that there were four Negroes, didn't you?
A No, I thought they were, and—but, I didn't know whether he was mixed or not when he had the red hair.
Q Didn't you tell the police that you thought that the one with the red hair had colored blood?
A I said he might have some colored blood.
Q And you told them that that same evening, isn't that true?
A I said I thought he was—he could be either, but I thought he had some colored blood.
Q He could be either what or what?
[fol. 92] A White or mixed.
Q Well, do you recall giving a statement to the police on the evening of December the 11th at the Firestone Substation, 7901 South Compton Avenue?
A I was down there, yes, sir.
Q And that would have been approximately 5:40 that same night, some time about 6:00 o'clock?
A I suppose around there somewhere.
Q Now, Mrs. Robbins, I am showing you a transcript of the interview that you had with the Sheriff's officers that night. I want to ask you to read to yourself on page 4, typewritten 4, line 8 through line 10, then lines 18 and 19—we will do that first.
A You will have to tell me again which ones.
Q All right. This is page 4 we are looking at, correct?
A Right.
Q Then, read lines 8 through 10 to yourself.
A Okay.
Q Have you done so?
A It is both—
Q Just a minute, just read to yourself.
Have you done that?
A All right.

Q Now, read to yourself also lines 18 and 19.
Have you done that?
[fol. 93] A Yes.
Q All right.
Now, I want to turn to page 10 and ask you to read to yourself lines 3 through line 12, on page 10 of your statement.
Have you done so?
A Mm-hmm.
Q Now, let me ask you if you gave the following answers to the following questions in the course of that interview—reading now, your Honor, from page 4, lines 8 through 10:

"Q" —by one of the police officers—"Both colored?
"A Uh-huh, and I think the other one was colored, too; I think the red-head is at least partially colored.
"Q Partially colored?
"A Uh-huh, he may have some white blood in him."

Now, down to page 18, lines 18 and 19 on the same page:

"Q And the other fellow is a light-complected person, at least partially colored?
"A Uh-huh."

A I thought he was.
Q Now, let me read from page 10 and ask you if you [fol. 94] gave these answers to these questions:

"Q Now, red hair, how did he wear his red hair?
"A Just back, I think.
"Q Pompadour, or was there a wave in it?
"A No, it isn't the slick type.
"Q It isn't the slick type?
"A No.
"Q Now, did the hair look like it could possibly be colored, mixture or colored?
"A I would say no, that is what I would judge, that he did use peroxide on it.

"Q Did he appear to be colored?
"A Partly colored, I would say.
"Q Partly colored?
"A Uh-huh."

Now, did you give all of those answers to all of those questions which I have just read?

A I guess I did.

MR. WARNBERG: Objected to as being incompetent, irrelevant and immaterial, your Honor; there seems to be nothing impeaching in the answers given at that time.

THE COURT: The objection is overruled.

[fol. 95] Q BY MR. WALTON: Now, Mrs. Robbins, as you sit there today and look at Harrington seated behind me, does he appear to be colored to you at all?

A No.

Q Would you say that you have got a good memory for faces, having trained yourself to try to recall faces?

Q Quite well, except when I feel something is wrong, why, then I don't know, but I—

Q But you take a particular, careful look at things when you think something might be wrong?

A Well, I try.

Q And do you know whether or not you tried on this occasion?

A I was paying more attention to what was happening Benny than most.

Q Now, no money was taken that day?

A No, they tried.

Q Well, did anybody say, "Give us your money?"

A No, sir.

MR. ROSEN: Your Honor, I will move to strike "they tried" as a conclusion.

MR. WALTON: I will join.

THE COURT: It may go out; the jury is instructed to disregard it.

MR. WALTON: No foundation.

Q And did the check which Cooper gave to you appear [fol. 96] to be a good check, as far as you could tell?

A Yes, sir.

Q You say the name "Gilbert Cooper" was on it?

A Yes, sir. And his driver's license had a typewritten address on the back.

Q In other words, nothing appeared to be wrong with that aspect of the transaction, as far as you could see; is that right?

A No, sir.

Q Nobody threatened you or anything?

A No, sir.

Q Do you recall what kind of a wine bottle it was that broke?

A I have forgotten now.

Q Did you know at one time?

A When they picked it up, I did.

Q Was it a Kalani?

A No.

Q It was regular wine; is that correct?

A It was some kind of white wine, I believe.

Q How long had Mr. Serna been working for you?

A Since October—

Q Did he—

A —but I had known him, he and his family for about seventeen years.

Q Do you know whether or not, based upon anything [fol. 97] you knew of him or from him, he had ever been involved in a robbery before?

A No, sir; he was a real honest man.

Q No, I mean as the victim, not as a robber. Do you know if he had ever been the subject of a robbery before?

A Not that I know of.

Q Do you recall how Harrington was dressed that day?

A No.

Q Did you ever give a description to the police of the man whom you now say is Harrington?

A I don't remember. I tried as best I could remember.

Q Well, can you tell us now what description you gave?

A No.

Q You haven't any idea?

A Not now, no.

Q Well, do you know what you told the police that day about other—except for what we have discussed here, about his race?

A I don't understand the question.

Q Well, you realized that you were interviewed that evening at Firestone?

A Yes, and I was quite upset.

Q Now, did you have any other conversations with the police apart from that one in which you perhaps discussed [fol. 98] the race of the man you now say is Harrington, whether he was Negro or Caucasian or whatever?

A When I was back in the kitchen and they—the fellow was trying to get me to make these plastic faces as best I could.

Q And was that before the interview that evening at Firestone?

A Yes, I believe it was.

Q Did he make a plastic face pursuant to your directions?

A We were trying, yes.

Q Well, did you ever see a completed, finished product?

A Well, I would say that some of them looked as near as I could remember them.

Q And did you give him directions which he followed in composing these faces?

A Yes, he would make different mustaches and hair and noses.

Q Now, did he ever complete a face pursuant to your directions which was intended to represent Harrington?

A No, I don't believe he did.

Q Do you know whether he ever completed a face pursuant to your directions intended to represent any of the other three defendants?

A We were trying to get some idea, yes.

[fol. 99] Q Did you ever see Mr. Serna involved in a struggle with anybody that day?

A Well, as he was coming up that north aisle I knew he was trying to get away from Mr. Bosby.

Q Well, this was after the collision?

A Yes.

Q You saw both of them on the floor at one point, didn't you?

A Yes.

Q Did you see one on top of the other?

A No, it happened very fast and they got up very swiftly.

THE COURT: We will take our noon recess at this time.

Ladies and gentlemen, we will recess until 1:45 this afternoon.

Instruct the witnesses to return at 1:45 this afternoon, please.

(Whereupon, a recess was taken until 1:45 p.m. of the same date.)

[fol. 100] LOS ANGELES, CALIFORNIA,
MONDAY, JUNE 21, 1965 1:52 P.M.

ARDIS ALLISON ROBBINS,

called as a witness by and on behalf of the People, having been previously duly sworn, resumed the stand and testified further as follows:

THE COURT: Will you please state your name again for the record.

THE WITNESS: Ardis Allison Robbins.

THE COURT: I will remind you also that you are still under oath.

THE WITNESS: Yes, sir.

CROSS EXAMINATION (Continued)

BY MR. WALTON:

Q Mrs. Robbins, there came a time during the course of this occurrence when you sort of lost track of things, isn't that true?

A Yes, I was a little shocked.

Q About when was that as you now recall? In other words, you have recited a sequence of events. When in this sequence was it that you sort of lost track of the developments?

A Well, it seemed like after it all happened.

Q Well, you mean after you ran out of the store or before that?

[fol. 101] A After.

Q You mean your mind just went blank?

A No, sir. But I was shocked. And he was a dear friend and I had known him a great many years.

Q Well, the statement which you gave to the sheriffs at Firestone was about four hours after the event, wasn't it?

A I was questioned there at the store for quite a length of time.

Q Several hours later you gave this formal statement?

A I guess so.

[fol. 102] Q And you spoke to other Sheriffs' officers part of that time, didn't you?

A They were asking names and what not.

Q Did you speak to other people there; that is, neighbors and others who had been drawn by the commotion?

A No, I didn't have a chance.

Q Never spoke to anybody of that character that afternoon; is that correct?

A One lady came in and when I noticed that little piece of metal on the counter I said, "Don't touch it."

Q All right. Now, you suggested that probably a wine bottle was on the refrigerator and might have been knocked off by force of the collision between Bosby and Mr. Serna?

A And there was some blood there and I didn't know how it got there unless they got cut on the bottle or something.

Q Where was this blood?

Will you step over to the diagram and indicate with just a little circle where this blood was that you saw?

A Right in here somewhere where the collision was.

Q Draw just a little circle in the general area, Mrs. Robbins.

Q Well, it was right in—they hit in here and there was some kind of blood there, along with the broken wine bottle.

[fol. 103] THE COURT: Do you want to actually physically draw it in, ma'am, where you think it was?

THE WITNESS: Somewhere in here. It was a little bit back of this because it was more in here, because—

Q BY MR. WALTON: All right, make it so that we can see it. Okay.

Did you see that blood there prior to the time that you heard the shot?

A No.

Q It was only afterwards that you saw the blood there; is that correct?

A After we had been all gone out and come back in the store, the Sheriffs were there.

Q Did it appear to be like a pool of blood or just spots on the floor?

A No, just a little bit of blood.

Q Did you ever see any Sheriffs examining that or taking samples of it?

A I don't know. I was closely questioned, then they let me go in the kitchen with this fellow making the faces.

Q Did you ever see any blood on anybody else other than Mr. Serna that day?

A No, sir.

Q Now, getting back to the wine bottle, do you actually remember whether or not there was a wine bottle on the [fol. 104] refrigerator?

A There usually is.

Q Well, I am not—

A I don't know—no, sir, at that moment, no, I don't know.

Q You just don't have any memory one way or the other; is that correct?

A No, there just usually is and you don't pay much attention to those things until the salesmen pick them up.

Q Did you ever see any cans of food or anything lying about the market?

A No, but there was a small bottle of Thunderbird on the floor where Mr. Serna was.

Q Did he fall at about the place where you kept the Thunderbird?

A Yes; I mean, that is where the accident took place, right there.

[fol. 105] MR. WALTON: I have nothing further.

THE COURT: Mr. Gordon?

MR. GORDON: No questions.

THE COURT: Do you have a few more questions, Mr. Warnberg?

MR. WARNBERG: If I may, your Honor.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. WARNBERG:

Q What happened to the driver's license that Mr. Cooper gave you?

A I believe he just picked it up with the check.

Q All right. And when the three defendants were standing there near the register, did you see any of them do anything at that time with their hands or fingers or anything?

A No, actually I didn't.

Q I have one more picture here. Let me ask you if this picture fairly represents the refrigerator that stands right near that nut rack.

May it be marked first, your Honor, as People's No. 9, I believe.

THE COURT: 9 for identification.

Q BY MR. WARNBERG: Take a look at People's 9.

A This is the back end of it.

[fol. 106] Q Yes. Is that the refrigerator as depicted on People's 4 as marked "Refrigerator"?

A Right, sir.

MR. WARNBERG: All right. I believe that's all, your Honor. Thank you.

THE COURT: Further cross, sir?

MR. ROSEN: Yes, I do, your Honor.

RECROSS EXAMINATION

BY MR. ROSEN:

Q Mrs. Robbins, do you recall making a statement to the police after this incident occurred? Do you recall that, making a statement to the police as to what happened?

A You mean down at the station or where?

Q Yes, at the station.

A Yes.

Q And there was a stenographic reporter who took down the questions that they asked you?

A I believe so.

Q And the answers that you gave?

A I believe so.

Q Now, in that statement you referred to one of these four people being taller than the others, a tall man?

A Yes.

Q And when you were referring to the tall man, were [fol. 107] you referring to Rhone?

A Mr. Rhone, yes.

Q All right. Now, directing your attention to December the 11th, 1964, the date of this incident, wasn't there a scuffle in the back part of the store between Serna, Bosby, and Rhone?

A No, Rhone was never back there, that I know.

Q Well, all right. As a matter of fact, didn't Rhone have a gun?

A Well, I didn't know whether it was he or Cooper that took mine, so I knew one of them had it.

Q Didn't Rhone have a gun that he put on Serna?

A No.

Q All right. I will direct your attention to page 12 of the transcript of your questions and answers to the Police Department, and ask you to read to yourself from line 13 through line 19. Will you read that to yourself, please.

A 13 through—

Q Through 19. I have marked them off from 13 through 19.

A I did not say Rhone—

THE COURT: No, just read it to yourself, ma'am. Don't make a comment yet, please.

THE WITNESS: I'm sorry.

Q BY MR. ROSEN: Have you read that, Mrs. Robbins?

[fol. 108] A Yes.

Q All right. I will ask you if the officer asked you these questions and you gave these answers.

"Q Now, you said something about a scuffle with Benny in the back of the store.

"A Yes. Evidently the tall one and the short one were buffing him between them.

"Q Did you see the tall one leave the sundry rack and go back towards the back end?"

A No, I didn't.

Q Just a minute.

"A I didn't, but I know he was back there."

Now:

"Q Now, the tall one—"

And you interrupted the question —

"A Because he evidently had a gun on Benny or forced him back there, and I know Benny was jerking around."

Now, did you give those answers to those questions to the interrogating officer?

A I only meant that Bosby—I didn't know that they were saying the tall one.

Q Well, didn't you say, in answer to the officer's questions, that the tall one went from the sundry rack back to the back of the store and that he, the tall one, and the short one, Bosby, were buffing Benny around?

[fol. 109] A No, I didn't—I don't believe I said that. I didn't mean it that way.

Q You didn't mean it that way?

A No. Because I only saw Bosby and Benny together.

Q And you didn't mean it when you said that the tall one had a gun on Benny?

A No. I didn't even know I said that. I figured that Bosby had one on him because Benny was trying to get away from him.

[fol. 110] Q You figured that Bosby had one on him?

A Prodding him with something, because Benny kept jerking.

Q Well, was there a scuffle back there in the back part of the store that you heard but didn't see?

A No, I just saw Benny come flying out of that little archway up towards the aisle up towards me, and Bosby was right behind him.

Q Well, now, you told us that you saw Benny coming towards you and this is after he was shot, when he reached the west end of that refrigerator and you saw him; is that right?

A After he was shot; I also saw him coming from further back.

Q Towards you?

A Before it ever—before Bosby and he ever turned around.

Q I am talking about after he was shot. Didn't you tell us that you saw him coming towards you?

A Yes, I did.

Q You did?

A Yes, he took several steps.

Q Well, did you see him then turn around after coming towards you and go back towards the sink where—

A No, he—

Q —he eventually fell?

[fol. 111] A I don't believe he ever turned around and went back, I believe he just stumbled back.

Q How do you believe he got back to the sink where he fell when he was coming towards you by the west end of the refrigerator when he was shot?

A Because they were saying, "Everybody back" and Benny had to move back in order for me to get by.

Q Did you go past Benny as you went back?

A I believe I did, because he was there and that is the only aisle to get back to the apartment.

Q Well, how many different people on that day, December 11th, did you see with guns in their hand?

A I saw Bosby and I am quite sure I saw one on Harrington. As we turned to leave it seems like there was a gun in his hand then, to go back to the back.

Q Well, didn't one of these four people put a gun on —is Mr. Ashcraft your brother?

MR. WALTON: Object to that as calling for a conclusion, being without foundation.

THE COURT: Sustained.

MR. ROSEN: Let me reframe the question:

Q Mr. Ashcraft is your brother?

A Yes, sir.

Q Just—

A Mr. Harrington only said, "Hold it."

Q Let me ask the question: did one of these four people [fol. 112] put a gun on Ashcraft?

A No, he was further from me than—

MR. ROSEN: Pardon me just a moment, your Honor.

Q All right, I will direct your attention—you did testify at the preliminary hearing in this case on January the 13th, 1965, did you not?

A Yes, at some time in Huntington Park.

Q Yes, in Huntington Park.

I will direct your attention to page 20 of your testimony at the preliminary hearing and ask you to read to yourself from line 2 through line 16, if you will, please.

Have you read that?

A Yes.

Q I will ask you if the District Attorney asked you the following questions and you gave the following answers at the preliminary hearing:

"Q What happened then?

"A So then Harrington had a gun on my brother and so did Cooper.

"Q You saw a gun in Defendant Harrington's hand, also?

"A He said, 'Hold it,' Harrington said it, and so then—

"Q Now, this wasn't your gun that Harrington had?

"A No.

[fol. 113] "Q This was another gun?

"A Uh-huh.

"Q And he was pointing it at your brother?

"A Yes.
"Q That is Mr. Ashcraft?
"A Yes."

Did you so testify at the preliminary hearing?

A Yes. When he said, "Hold it," why, I looked there and it looked like he had a gun.

MR. WALTON: I would ask your Honor to give the jury at this point a limiting instruction upon what apparently is an attempt to impeach the testimony of this witness, and have the Court note that it is only for impeachment and the effect of that is to be left for the jury's consideration.

THE COURT: The objection is overruled.

Q BY MR. ROSEN: Let me ask you this question: did Harrington have a gun on your brother, pointing it at him?

A No, he just had a gun there and he said, "Hold it," when my brother said, "Come on, Bobby, let's go to the back."

Q Well, who pointed a gun at your brother?

A They didn't; they just had it by their hip there and just said, "Hold it."

Q Are you telling us that nobody pointed a gun at your brother?

A Well, it was pointed at both he and I, we were right [fol. 114] close together.

Q And was this at the time that you were ordered to go back to the back part of the store or right at the beginning of the series of events?

A After they had taken my gun, then—I don't know what they thought my brother would do, so—

Q But this gun that was pointed at you and your brother was not the gun that was taken from you?

A No.

Q The fact is, Mrs. Robbins, that just before you heard this shot, the struggle that occurred—strike that.

Just before you heard the shot you did hear some kind of an altercation or fight between Bosby and Serna?

A No, he just jerked him around and that is when I seen the gun and he said, "Hold it, man, I told you don't

give me no trouble"—or, "Man, I told you don't give me no trouble"; he might not have said, "Hold it."

[fol. 115] Q Where was Rhone at this time?

A He was in the center of the other two fellows.

Q In the center of the other two fellows?

A Uh-huh, I believe he was.

MR. ROSEN: All right. That's all.

RECROSS EXAMINATION

BY MR. MOORE:

Q While Mr. Cooper had given you a check, you examined that check, right?

A Right.

Q And it was during that time, was it not, that Mr. Bosby walked in and walked directly to the beer case?

A Right.

Q It was after that that Mr. Harrington and Mr. Rhone walked in?

A After Cooper went back out after the check, why, then they came in right behind him.

Q Well, let me ask you if this is not correct; that while you were examining the check that Cooper had given you, Mr. Bosby walked into the store and walked to the beer case?

A No.

Q And then Rhone and Harrington came in the store thereafter, is that correct?

A Bosby and Cooper came in first, and Bosby stayed [fol. 116] back at the back.

Q All right. Let me ask you, did you talk to Sergeant White and Sergeant Vaughn about 5:40 on that date?

A I talked to several sheriffs.

Q The gentleman here is Sergeant Vaughn. Do you remember talking to him that afternoon?

A Yes.

Q And his partner, Mr. White?

A Yes.

Q Did you not tell them that while you were examining the check and driver's license, that you saw Defendant

No. 3, designated here as Bosby, enter the store, walk directly to the rear of the store near the beer case, and then you observed Defendants 2 and 4, designated as Harrington and Rhone, enter the store and stand near the sundry rack? Did you tell that to the officers?

A No, I don't believe so.

MR. MOORE: All right, thank you. That's all.

RECROSS EXAMINATION

BY MR. WALTON:

Q Mrs. Robbins, do you recall telling the police officers there were two guns involved, including the one taken from you?

A Yes, I believe there were.

[fol. 117] Q Now, you say that the reason that Mr. Serna fell at some point east of the place where he was standing when the shot was fired was because he was starting to move to the back, is that correct?

A They had ordered us to the back. We had to get by, and Mr. Serna and—it's a very narrow aisle there, you have to get through.

Q Tell me, was the statement "Everybody to the back" made before or after the shot was fired?

A After.

Q And had you ever heard any prior statements by Bosby to Serna about "Don't give me any trouble"?

A No, other than right behind the meat counter there.

Q That was the first conversation you heard between Bosby and Serna, right?

A That's the first I heard.

Q Did you ever hear any conversation among the defendants in the store?

A I don't believe they said a word to each other.

MR. WALTON: I have nothing further. Thank you, your Honor.

MR. GORDON: No questions.

THE COURT: Thank you, Mrs. Robbins. You may step down.

MR. WARNBERG: May I call, your Honor, Mr. Ashcraft?

[fol. 118] THE BAILIFF: Raise your right hand, please, and face the Clerk.

THE CLERK: You do solemnly swear that the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: Yes.

DARRELL ASHCRAFT,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Will you be seated, please. Will you state your name.

THE WITNESS: Darrell Ashcraft, D-a-r-r-e-l-l A-s-h-c-r-a-f-t.

DIRECT EXAMINATION

BY MR. WARNBERG:

Q Are you related to Mrs. Robbins?

A Yes, I am her brother.

Q Were you with her at her grocery store on December the 11th, 1964?

A Yes.

Q Were you over there about 2:00 to 2:30 p.m. that afternoon?

A Yes, I was.

[fol. 119] Q And just briefly what were you doing there?

A I was helping her out.

Q Anyone else there at the time?

A Yes, there was Benjamin Serna.

Q He was a clerk there?

A Yes.

Q All right. Now, were you near the cash register some time during that half hour period?

A Yes.

Q And did you see someone come in and cash a check or try to cash a check?

A Yes.
Q Who was that?
A Mr. Cooper over there.
THE COURT: Which one? There are several gentlemen sitting there, sir. Which one is Mr. Cooper?
THE WITNESS: In the back row, the second from the left.
THE COURT: The record may indicate that the witness has indicated the Defendant Cooper.
Q BY MR. WARNBERG: Now, was that the first time you saw Defendant Cooper?
A Yes.
Q About what time was it?
A That would have been about 2:15, somewhere along there.
[fol. 120] Q 2:15 p.m.?
A I didn't look at the clock.
Q All right, approximately. Was Mr. Cooper alone then?
A Yes, at the time he was.
[fol. 121] Q And just briefly tell us what you observed him do.
A Well, the first time he came in he asked to cash a check. And then he said he didn't have the check and then he left.
Q I see. In other words, there were two occasions that you saw him come in?
A Yes.
Q Now let's talk about the first time. And at that time where did he go, the first time?
A He went outside to get the check.
Q Well, no. He came in first and asked to cash a check?
A Yes.
Q Where did he go, to the cash register? Or where did he go?
A Yeah, to the cash register.
Q Who was there at the cash register?
A My sister was there at the time.
Q Were you there?

A I was in that vicinity.
Q Did you hear the conversation?
A Yes.
Q All right. Was anyone with Cooper then that time?
A No, I didn't see anyone, anyway.
[fol. 122] Q All right. In other words, you saw Defendant Cooper walk up to your sister, and what did he say that you heard?
A He asked to cash a check. And she asked him—said, "I'll have to look at it."
Q Go ahead. What did he say?
A Then he said he didn't have it, he'd have to go out and get it.
Q Anything else said at that time?
A I can't recall it, no.
Q All right. Now, I'm going to just refer you to People's Exhibit 4 for a moment. This is a sketch, I believe, of the interior of the store.
Do you recognize it, particularly—
THE COURT: Turn it a little bit this way, please.
MR. WARNBERG: Yes.
THE COURT: That is enough.
MR. WARNBERG: All right. Thank you.
Q Particularly there is an entrance by the designation of "Screen door" and "Door" and over here a designated area called "Cash register."
A Yes.
Q That cash register area is the area where Cooper went the first time to talk to your sister?
A That is the first time I saw him, yes.
Q Approximately where were you?
[fol. 123] THE COURT: Sir, when you answer the questions, will you still talk into the mike, please.
THE WITNESS: All right.
THE COURT: Thank you.
THE WITNESS: At that time I was down towards the cigar case.
Q BY MR. WARNBERG: In other words, as we look at the diagram, just to the left of the cash register?
A It was to the west of the cash register at the time.
Q At the area called "Cigar case"?

A Yes.
Q Is that approximately what happened at that time?
A Yes.
Q All right. Then did Cooper leave?
A Yes.
Q Did you see anybody else then?
A I didn't notice anyone, no.
Q All right. Did you stay at the cigar case, in that area?
A No. I waited on—a couple of kids come in, wanted candy at the time.
Q In other words, you left the cigar case area?
A Yes.
Q Where did you go?
A Well, I went down to the candy case to wait on the [fol. 124] children who wanted the candy.
Q In other words, that's the other side of the cash register?
A Yes.
Q All right. Then what happened, if anything?
A Well, Cooper came back, and another fellow came in and asked me about Kilani wine.
Q Now, were the kids still there?
A No, I think they had gone.
Q All right. In the meantime they left?
A Yes.
Q Now, then, Defendant Cooper came back in with somebody else?
A I didn't see them come in together, no.
Q Where did you notice them?
A Well, the first I noticed was the man on this end at the back.
Q Now, referring to the defendant who is sitting closest to my side?
A Yes.
THE COURT: The record may indicate he is indicating the defendant Bosby.
Q BY MR. WARNBERG: All right. Well, where was Defendant Bosby when you first noticed him?
A He had walked by the candy case by the refrigerator there.

[fol. 125] Q All right. And was the defendant Cooper then in the store?

A Yes.

Q Where was the defendant Cooper?

A He was at the cash register again.

Q All right. And Defendant Bosby over by the refrigerator?

A Yes.

Q Then what happened?

A Well, Defendant Bosby asked me about Kilani wine. He said he wanted a small bottle of Kilani wine.

Q That is what Defendant Bosby asked you?

A Yes.

Q Go ahead. What happened then?

A I showed him the only size Kilani wine there was at the time.

Q And were you still standing by the refrigerator?

A Yes, I was back of it.

Q And he was in front of it?

A Yes. And he said that the bottle of Kilani wine was too large, he wanted a smaller bottle.

Q All right. So what did you do?

A I put the wine back.

Q Right in back of you?

A Yes.

Q All right. Did you turn around again?

[fol. 126] A Yes.

Q Then what did you see, if anything?

A Well, I put a few bottles up in the rack, and then I came on back towards the candy case.

[fol. 127] Q By "putting bottles back on the rack," in back of the refrigerator—

A They were back of—

Q —there is an area designated "liquor shelf"; is that the area?

A That is what I am talking about.

Q Then you left that area and where did you go?

A I came up to the candy case.

Q Near the cash register?

A Yes, to—from looking at it this way, to the right of the cash register.

Q I know it is difficult, but, as best you can, keep your voice right in the microphone.

All right, then who did you see at that location?

A The third man.

Q All right.

A From the left.

THE COURT: You mean in the courtroom?

THE WITNESS: Yes.

THE COURT: Which row, the first or second row?

THE WITNESS: The back row.

THE COURT: Indicating the Defendant Harrington.

THE WITNESS: Yes.

Q BY MR. WARNBERG: Now, is that the first time you noticed Defendant Harrington?

[fol. 128] A Yes.

Q Where was he?

A He was in front of the candy case—looking at it, to the right of the candy case.

Q All right, who else was there besides you and the Defendant Harrington, if anyone?

A No one there in that immediate vicinity, no.

Q Anyone else in the store, did you see?

A Oh, yes.

Q Who did you see in the store?

A Well, Bosby was still back by the refrigerator at the time; Cooper was at the cash register at the time. That is all I noticed there at that time.

Q Is this the same time you saw Harrington standing there?

A Yes.

Q He was standing near the candy case?

A Yes, with a gun in his hand.

Q And Harrington had a gun?

A Yes.

Q Did you notice any weapon of the other defendant?

A At that time, no.

Q Now, what happened right then?

A He said something to me.

Q First, who?

A Harrington.

[fol. 129] Q All right

A Said something about, he said, "Hold it," and at that time I heard a commotion down by the refrigerator and Benjamin Serna was scuffling with Bosby there.

Q All right.

Where did you see Mr. Serna and Bosby at that time?

A At the time I heard Benjamin Serna say either, "Damn" or "Damn it."

Q And where—

A And then I looked around and it was at that time that Harrington told me to hold it. I looked up and saw a gun in Harrington's hand.

Q I see. In other words, this happened about simultaneously?

A Yes.

Q Where was that gun pointed?

A At me.

Q That is the one Harrington had?

A Yes.

Q Now, you heard Serna and Defendant Bosby somewhere else. Where were they?

A They were down below by the refrigerator. They knocked over a bunch of potato chips and some—I noticed the potato chips on the floor.

Q All right.

[fol. 130] Now, up to that time you have identified three of the defendants in the store; correct?

A Correct.

Q Did you notice up to that time anybody else?

A I hadn't at the time, no.

Q Now, what is the next thing that happened?

A Well, then Cooper drew out a gun.

Q Is he the man that was standing near the cash register?

A Yes.

Q Who was near the cash register at that time?

A Cooper was closest.

Q Who else?

A Well, my sister was behind the cash register.

Q I see; and you were nearby, also?

A I was by the candy case, approximately four feet from her.

Q Now, as Cooper drew his gun, what is the next thing that happened?

A Then I seen my sister trying to get her gun.

Q All right, what did she do?

A Then—

Q I mean, first, did she get a gun or—

A She didn't get it out, no.

Q What did she do to try and get it?

A She reached under the counter to get it.

[fol. 131] Q In other words, there is a drawer there; is that it?

A Yes.

Q She didn't get it it?

A No.

Q What happened then?

A The other defendant, the fourth man in the back row—

THE COURT: The fourth man from the left, sir?

THE WITNESS: Yes.

THE COURT: Indicating the Defendant Rhone?

THE WITNESS: Yes. He got hold of her arm and took the gun away, as far as I know. I was looking several different ways. As far as I know, he took the gun away from her.

Q BY MR. WARNBERG: This is the first time you noticed Defendant Rhone?

MR. GORDON: Your Honor, I move to strike "as far as I know he took the gun away," as perhaps a conclusion of this witness, perhaps it is based on speculation. It sounds like it.

THE COURT: It can be covered on cross examination, sir, and if it is you may make a motion to strike.

MR. GORDON: All right.

Q BY MR. WARNBERG: Your sister was standing behind the counter at the cash register?

[fol. 132] A Yes.

Q Did you notice anything in the Defendant Rhone's hand just before he grabbed your sister?

A No, I did not.
Q What happened when he grabbed your sister?
A Well, he took the gun away from her.
Q Did she get a gun, then, in the meantime?
A She had it in her hand and he reached over and got the gun.
Q What did he reach over, the counter or what?
A Well, looking from here, he reached over from the left of the cigar case.
Q In other words, as we look at it he was then standing to the left of the cash register?
A He reached over from the left, yes.
Q And that is what is called the cigar case there?
A Yes.
Q And were you still standing over there by the candy case?
A Yes.
Q Did he get her gun?
A Yes.
Q What happened then?
A Someone said, "Everyone go to the back"—which one said it, I don't know.
Q "Everyone go to the back"?
[fol. 128] A Yes.
Q All right.
A So I turned my sister around and started to push her towards the back.
Q I take it, then, you moved over to where she was?
A Yes, in the meantime I had, yes.
Q Were there two defendants still there?
A Yes.
Q How about Defendant Bosby, did you notice where he was then?
A I hadn't seen Bosby since he and Benny Serna had collided or something, where they spilled some potato chips by the refrigerator there, in front of the refrigerator.
Q All right, and then what happened? You reached for your sister—
A I was—I said, "We might as well do what they

say," and was shoving her, started to shove her aside and about that time heard a shot.

Q Where did you hear the shot?

A I just heard it. I was pushing her around when I heard the shot.

Q Did you look around over there?

A Yes.

Q What—

A I was—as we were going back I saw Benjamin Serna falling backwards.

[fol. 134] Q Anyone near him at the time?

A I didn't see anyone, no.

Q Serna fell?

A Yes.

Q Where did he fall?

A He fell, oh, about midway of the refrigerator, back of it, or maybe a little to the east of it.

Q In back of the refrigerator?

A Yes.

Q We have an X up there marked R-2—

MR. WALTON: Excuse me, your Honor, this is leading the witness. I object to that kind of questioning.

MR. WARNBERG: Merely calling—

THE COURT: Sustained.

Q BY MR. WARNBERG: All right, would you go to the board and draw an X on People's Exhibit 4 where you saw Mr. Serna fall? Just pick up a crayon right there on the board and—

THE COURT: Why don't you make it an S instead of an X, and we won't have so many X's up there to distinguish it.

THE WITNESS: Do you want me to put an S?

THE COURT: Yes.

THE WITNESS: I thought he was along about here.

THE COURT: The record may indicate the witness has placed an S where the thought the Defendant Serna fell back of the refrigerator.

[fol. 135] Q BY MR. WARNBERG: All right, when you saw him falling there what did you do?

A Went right on through.

Q What do you mean, you walked, or where were you going?

A I was pushing my sister ahead and we went right on through.

Q You have to speak up.

A We went right on through the back.

Q In other words, you were told to do that; is that correct?

MR. WALTON: Objected to—

THE WITNESS: They had said, "Everyone to the back."

MR. WALTON: Excuse me, excuse me, that is a leading question, your Honor; I object to that question.

THE COURT: Overruled. It has already been asked and answered.

MR. WALTON: May we have the answer read? I didn't hear it.

THE COURT: He gave it previously.

MR. WALTON: If he just gave some answer it is in the record—

THE COURT: I am telling you that he gave it previously.

Please continue.

Q BY MR. WARNBERG: I just wanted to have you [fol. 136] describe where you walked. In other words, you walked some place?

A Yes, behind the cash register, behind the refrigerator, back in the back.

Q In other words, did you walk by the point S?

A Yes.

Q Did someone walk with you?

A Yes, my sister was ahead of me.

Q Anyone behind you?

A No, not that I know of.

Q Where did you go?

A Right on through into the living quarters behind.

Q Is that the area called the storage room, or what? I notice an area to the right—

A No, it is beyond. Where you see "Door," the E, exit, beyond there.

Q In other words—

A There is living quarters behind that.
Q I see; to the east of the store?
A Yes.
Q And you went over there?
A Yes.
Q What did you do there, if anything, just stay there?
A No, I went outside and come back and tried to [fol. 137] get on the phone there. It was busy.
Q In other words, you made a phone call and couldn't get through?
A That's right.
Q Did you go back in the store, or what did you do?
A Then I went around the store and there was a man in there calling the police then. I went around into the store from the front entrance, from the west entrance.
Q In other words, then, you went around to the front of the store?
A Yes.
Q And came back into the store?
A Yes.
Q Did you see the defendants in the meantime?
A No, they were gone.
Q Did you see how they left?
A No, I did not.
Q So when you got back in the store who was there then, if anyone?
A There was one man calling the police.
Q Anyone else?
A No, I didn't see—I saw no one else. There was a man named Campbell was a customer, was calling the policemen.
Q Was your sister there?
[fol. 138] A No.
Q Did you go over and see Mr. Serna?
A I saw him laying there. I told Campbell to try and get an ambulance because I didn't know whether—how badly he was hit.
Q Now, did you see the defendants after that at any time?
A No.

Q Let me show you People's Exhibit No. 6. Do you recognize that gun?

A Yes.

Q Is that the one that was taken from your sister?

A Yes. Yes, it was.

Q Let me show you People's Exhibit No. 7. Does that look like the gun Defendant Harrington had?

A It could have been.

MR. WARNBERG: Cross examine.

THE WITNESS: It was a revolver. I couldn't swear that that was the gun that he had.

MR. WARNBERG: Cross examine.

CROSS EXAMINATION

BY MR. ROSEN:

Q Mr. Ashcraft, as I understand your testimony, you saw a gun in the hand of the Defendant Harrington that [fol. 139] looked something like People's 7; is that right?

A It looked something like that, yes.

Q You saw a gun in the hand of Mr. Cooper?

A Yes.

Q And you saw a gun in the hand of Mr. Rhone?

A I did not say that.

Q Well, that was the gun that he took from your sister.

A Yes.

Q All right, so that is three guns altogether, is that right?

A Yes.

Q You did not see a gun in the hand of Mr. Bosby?

A No, I did not.

[fol. 140] Q All right. Now, you told us that when Bosby came into the store he stopped at the refrigerator and you asked him what he wanted, and he asked you about some wine, is that right, sir?

A He asked me about a bottle of Kilani wine.

Q Yes. And apparently you didn't have the right size bottle for him?

A I showed him the size we had and he said he wanted a smaller bottle.

Q All right. And you put the wine bottle back?
A Yes.
Q And Bosby went towards the rear of the store at this time, is that correct?
A At that time I didn't notice which direction he went.
Q You didn't pay any more attention to him?.
A No.
Q All right. You went back to the cigar case area?
A No, the candy case area.
Q The candy case, excuse me.
You were behind the counter?
A Yes.
Q Your sister, Mrs. Robbins, was to your right, wasn't she?
A West—well, yes, she was—
Q I mean—
[fol. 141] A As the direction you are looking at.
Q All right. She was west of you?
A Yes.
Q And this is the time when you heard some kind of a scuffle between Mr. Serna and somebody else?
A Yes.
Q You didn't see the scuffle?
A Not at that time, no.
Q Where did that scuffle sound to you like it was coming from, what part of the store?
A It was in front of the refrigerator.
Q You mean in this front area right here where I'm pointing at?
A Probably a little farther down.
Q A little farther east?
A Yes, along in there.
Q Along in here?
A Yes.
Q Was that when the potato chip rack fell?
A Yes.
Q Did you watch that scuffle?
A I glanced at it.
Q Did you see either of the two people that were scuffling fall down to the floor?
A No.

Q Well, then, I take it it was at that time that [fol. 142] Harrington put the gun on you?

A Yes.

Q So you didn't pay any more attention to that?

A No, I was looking at Harrington.

Q And was it about that time that your sister reached for her gun?

A It was shortly afterward, yes.

Q Shortly after that.

As I understand it, you were standing here at the candy case, is that right, where I am designating?

A A little farther down.

Q A little further east?

A Yes.

Q About here?

A About the end of it, yes.

Q And your sister was standing by the cash register here, is that correct?

A Yes.

Q All right. Then your sister reached for her gun and Rhone took it away from her, is that right?

A Yes.

Q You are still standing here at the candy case?

A Yes.

Q That is when you heard what sounded to you like a shot?

A No.

[fol. 143] Q Well, was it before that or after that?

A It was after that.

Q It was after that?

A Yes, after they—someone said, "Everyone to the back."

Q Somebody said, "Everyone to the back"?

A Yes.

Q And you heard a shot?

A It was after we were turning around that I heard the shot.

Q Well, when you say turning around, you mean you were turning around to walk in the direction of the back?

A That's right.

Q What about your sister, what was she doing at the time?

A I was shoving her ahead of me.

Q You were pushing her ahead of you?

A Yes.

Q When you heard the shot?

A Yes.

Q Did you see who shot?

A No, I did not.

Q Did you see Mr. Serna at that time, at the time you heard the shot?

A No. Shortly afterwards I saw him falling backwards.

[fol. 144] Q Was he coming towards you as you were going towards the rear?

A No, he was falling backwards.

Q He was falling backwards. Was it shortly or just about—strike that.

You told us you heard Mr. Serna say, "Damn" or "Damn it," something to that effect?

A That was when he was scuffling in front of the refrigerator.

Q That was a few moments before the shot?

A That was before, yes.

Q Did you hear a wine bottle break?

A No, I did not.

Q Or any cans—

Do you have cans in the store?

A Yes.

Q Any of them fall to the floor?

A I didn't hear it, no.

Q Well, as you were going towards the rear of the store, after they told you to go back there—

A Yes.

Q —you tell us that you did not see the person who shot Serna, is that right?

A I did not, no. My sister was in front of me.

Q I see. You mean she was obstructing your view?

A Yes.

[fol. 145] Q Possibly?
A Possibly.
Q Was the only time that you saw Bosby there when you had this discussion about the wine?
A Yes.
Q You didn't see him after that?
A No, I did not.
MR. ROSEN: All right, sir, thank you. That's all I have.
THE COURT: We will take our afternoon recess at this time, ladies and gentlemen. We will recess for fifteen minutes.

(Recess taken.)

[fol. 146] THE CLERK: You are still under oath. Will you state your name for the record, please.
THE WITNESS: Darrell Ashcraft.
THE COURT: Mr. Moore.
MR. MOORE: I have nothing at this time.

CROSS EXAMINATION

BY MR. WALTON:

Q Mr. Ashcraft, you said you heard a shot and saw Mr. Serna fall backwards; is that correct?
A That's correct.
Q Now, Mr. Serna was behind the refrigerator at that time; is that correct?
A Yes.
Q You were, also?
A No; at that time, no.
Q Where were you?
A I was up by the cash register at the time.
Q And you say you saw Harrington there, the fellow sitting behind me?
A He was in front of the candy rack.
Q Is that the place marked "Candy case" on the diagram, People's 4?
A That's right.
[fol. 147] Q This is at the time the shot went off?
A No, that was before the shot went off.

Q And now, at the instant this shot went off, where was he, if he was in there?

A I do not know.

Q He wasn't behind the refrigerator, was he?

A No, he was not. I do not think so.

Q Now, as you sit there this afternoon and look at Harrington, do you think he is Negro?

A No, I do not?

Q Didn't you tell the officers you thought that all four of them were Negro?

A I did.

MR. WALTON: I have nothing further.

THE COURT: Mr. Gordon.

CROSS EXAMINATION

BY MR. GORDON:

Q Sir, I only have one question for you, and that is with reference to your statement about Mr. Rhone.

I believe you indicated that you saw him get hold of your sister's arm and, as far as you know, he took the gun away and—

A As far as I know, yes.

Q Yes. Tell me what you mean by "as far as I know."

A He had a hold of her arm.

[fol. 148] Q But you don't know whether he is the one that took the gun or not?

A No, I do not.

MR. GORDON: That's all I want to know.

Thank you very much.

THE COURT: Mr. Warnberg, anything further?

MR. WARNBERG: I believe that's all.

THE COURT: You may step down, sir. Thank you.

MR. WARNBERG: Mrs. Lottie Williams.

THE BAILIFF: Raise your right hand, please, and face the clerk.

THE CLERK: You do solemnly swear the testimony you may give in the cause now pending before this Court to be the truth, the whole truth, nothing but the truth, so help you God?

THE WITNESS: I do.

LOTTIE MAE WILLIAMS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

THE CLERK: Be seated, please. Will you state your name, please.

THE WITNESS: Lottie Mae Williams.

[fol. 149] DIRECT EXAMINATION

BY MR. WARNBERG:

Q Mrs. Williams, do you live somewheres near this grocery store?

A Yes, sir, I do.

THE COURT: What grocery store?

MR. WARNBERG: I was just trying to look it up, your Honor.

It is at 6126 South Holmes Avenue. I'm sorry.

Q Do you live near that address?

A Yes, I do.

Q That is Mrs. Robbins' grocery store?

A Yes.

Q Have you been there many times?

A Sure. I worked for her.

Q All right. Were you there last December the 11th, 1964?

A I were.

Q Were you in the store that day?

A Yes, I were.

Q Were you there some time from 2:00 to 2:30 p.m. that afternoon?

A Well, I don't know exactly, but it was just before the kids came out of school.

THE COURT: What time do the kids usually get out of school?

THE WITNESS: 3:00 o'clock.

[fol. 150] THE COURT: Thank you.

Q BY MR. WARNBERG: Now, before going into that store, did you notice an automobile outside?

A Yes, I did.

Q And when did you notice that car?

A Well, I noticed it before I went to the store. It was parked across the street in front of my house before I went to the store.

Q Where is your house in relation—

A 1888 61st Street.

Q That is across the street from the store or next door to it or what?

A In front of my house. I live right around the corner from the store.

Q In other words, you are around the corner, so to speak?

A Yes.

Q Did something attract your attention to that car?

A Well, it didn't until I went to the store and seen the same car and the same people.

Q In other words, you saw some people in the car?

A Yes, sir.

Q And now, generally who did you see in the car?

A Four men.

Q Four men?

[fol. 151] A Yes, sir.

Q Can you describe those men for us?

A Yes, sir. Four colored and one white. I guess he was white; he had a red head.

Q What make of car was it, did you notice that?

A Well, I don't know about the make, but being it was two-tone.

THE COURT: It was what, ma'am?

THE WITNESS: Two-tone, light green and dark green.

Q BY MR. WARNBERG: You didn't know the individuals who were in the car?

A Beg your pardon?

Q You didn't know the individuals who were in the car?

A I didn't know them.

Q About what time was that?

A Oh, I really don't know. It was just before the kids come from school, I know. I didn't pay any attention to the time, I tell you.

Q All right. Did those individuals stay in the car?
A No.
Q Well, what did you see them do?
A Well, one got out of the car and he latched the hood and he did something under it—what, I don't know—then he came in the store behind me and the other two was standing across the street at the bus stop and the [fol. 152] other one was standing at the corner of the store; so, I went in and one came in behind me, then the other one came in. One tried to cash a check—
Q Just a minute. Now, maybe it would help if you talked just a little slower. Would you do that for us?
A Yes, sir.
Q In other words, you personally went into the store?
A Yes, sir.
Q Where did you go?
A I went in the store and I went back to the beer counter.
Q To the beer counter?
A Yes, sir.
Q Was anyone with you?
A No, sir.
Q All right.
Now, you say someone, you say, tried to cash a check?
A Yes, sir.
Q Do you know who that person is?
A Yes, sir.
Q Is he here in court today?
A Yes, sir.
Q Just point him out for us, if you would.
A This one right here.
[fol. 153] THE COURT: Which way—there are eight men sitting, four at the table and four behind those four at the table.
THE WITNESS: This colored gentlemen right here.
THE COURT: I want to do it by delineating or designating, either the man at the end, the second one, third one or the fourth one.
THE WITNESS: Well, the second one right there.
THE COURT: In the second row?

THE WITNESS: The second one right there at the bar.

THE COURT: Pardon me?

THE WITNESS: At the little gate, or whatever you call it.

THE COURT: Is he the one sitting behind the man in the glasses here at the counsel table?

THE WITNESS: That is the one I am talking about.

THE COURT: Indicating the defendant Cooper.

Q BY MR. WARNBERG: Now, what did you hear, if anything, Cooper say?

A He asked Bobby would she cash a check for him and she asked him what kind of check. So then he put his hand back here—

Q Indicating his pocket?

A —and then he went outside.

Q Just a minute. Indicating his pocket?

A Yes, sir; then he went outside and he came back in the store with an envelope.

[fol. 154] Q With a what?

A An envelope.

Q In other words, you stayed within that area of the cash register?

A Yes, sir.

Q Was anyone else there besides Defendant Cooper and Mrs. Robbins?

A Just him and her and I was standing beside her.

Q I didn't get the first part, I am sorry.

A Just him and her and I was standing beside him.

Q Then Defendant Cooper left?

A He went outside and he came back with the check.

Q How long would you say he was gone?

A Oh, he just went out and come right back in.

Q When he came back did he come back alone or was there anyone with him then?

A He came back alone.

Q Where did he go?

A He went back to Bobby with the check.

Q This is Mrs. Robbins?

A Yes, sir.

Q Did you hear what took place then?

A She asked him for his identification card and he pulled it out.

Q His identification?

A Yes, sir.

[fol. 155] Q All right, what did he say?

A Beg your pardon?

Q What did Cooper say, if anything?

A He put a little piece of paper up onto the counter with a picture on it. I don't know whether it was a driving license or what; all I know, it had a picture on it.

Q In the meantime did you notice anyone else?

A Oh, the other one, he ordered a bottle of wine from Darrell.

Q Another man?

A Yes, sir.

Q Do you know who that man is?

A Yes, sir.

Q Is he in court today?

A This one right here, first one.

THE COURT: The first one?

THE WITNESS: Yes, sir.

THE COURT: Sitting behind the man with the yellow pad?

THE WITNESS: Yes, sir.

THE COURT: Indicating the defendant Bosby.

Q BY MR. WARNBERG: Now, you say you heard him or saw him ordering a bottle of wine?

A Yes, sir.

Q Where was he doing that? That is the defendant Bosby.

[fol. 156] A Beg your pardon?

Q That is defendant Bosby you saw doing that?

A Yes, sir.

Q Where did you see him doing that?

A He asked him for a bottle of wine.

Q Inside the store?

A Yes, sir.

Q All right.

Now, where, in relation to that cash register?

A He was right down from the cash register.

Q In other words, standing next to Cooper?

A He was on the other side. You see, the counter is straight down.

Q The counter is straight down?

A Yes, sir, and he was down further than this other guy.

Q Was somebody waiting on him?

A He ordered the wine from her brother.

Q That is Mr. Ashcraft?

A Yes, sir.

Q Do you know his name?

A All I call him, Darrell.

THE COURT: She calls him Darrell.

MR. WARNBERG: "Darrell," I'm sorry.

Q In other words, he was talking to Darrell?

A Yes, sir.

[fol. 157] Now, in the meantime did you see anyone else?

A The other two came from across the street and they came in the store.

Q Who do you mean by the other two?

A The redhead and the tall one; I don't know their names, though.

Q Do you see them in court?

A Yes, sir.

Q Are they here today?

A Yes, sir, right over there.

Q Just—

A Right over there.

THE COURT: Which one was the redhead and which one was the tall one?

THE WITNESS: The one behind the man in the glasses, and the gentleman sitting over behind the man over there in the green suit on.

THE COURT: Well, there are two men at the counsel table with glasses; one has dark—

THE WITNESS: This one right here.

THE COURT: You see, when you say "right here," dear, I don't know where you are pointing. There are two men with the glasses; one has light colored frames and the other has dark colored frames.

THE WITNESS: The light frames.

THE COURT: The light frames?

[fol. 158] THE WITNESS: Yes, sir.

THE COURT: The one behind him? That is the Defendant Cooper. Is that the one that cashed the check?

THE WITNESS: The one that cashed the check.

THE COURT: Is that the same one you were talking about?

THE WITNESS: No, he asked me about this white guy. I don't know if he is white or what he are, but the light one.

THE COURT: You talked about two men—

THE WITNESS: Yes, sir; and he asked me about another one.

THE COURT: When you say "the white guy," is he the one that you say had red hair?

THE WITNESS: Yes, sir.

THE COURT: Is that the man sitting behind the man with the striped tie?

THE WITNESS: Sitting right behind this man over here with these light glasses on.

THE COURT: Oh, I see. From her angle, that is "behind," I get it now—indicating the Defendant Harrington.

What about the other man?

THE WITNESS: He was with him.

THE COURT: Which one?

THE WITNESS: They both came in the store, this [fol. 159] gentleman over here with the striped shirt on—

THE COURT: Indicating the Defendant Rhone.

Q. BY MR. DEFENDANT WARNBERG: All right. Now, let me get this. You tell us in your own words just what happened. Will you do that?

A. Well, when they—the two came in, the last two came in, I gave the little friend of mine a dime to get her some candy. And I turned and come out of the store. And I heard something, but I thought it was the car passing, and all four of them passed by me runnning. And they got in the car.

And the car seemed like it didn't want to take off. And I started hollering—I say, "Take those—the license

number. There goes some guys done robbed the store." The little girl was—

MR. WALTON: Move that be stricken, your Honor.

THE COURT: It may go out. The jury is admonished to disregard it.

MR. WARNBERG: I think I better ask the questions.

Q In other words, you were at the cash register?

A Yes, sir.

Q All four defendants in the store?

A Yes, sir.

Q Did you see anything in any of their hands?

A No, sir.

Q What did you do at the cash degister personally, [fol. 160] were you buying something?

A Yes, sir.

Q What were you buying?

A Light bulb and a quart of beer.

MR. WALTON: Move the answer be stricken, object to the question as being immaterial.

THE COURT: Sustained. It may go out.

Q BY MR. WARNBERG: Who waited on you?

A Her brother waited on me for the quart of beer and Mr. Serna, he changed the lightbulb for me.

Q All right. After you did that, what did you do?

A Then I gave the little girl a dime to get her some candy, and I walked out of the store.

Q Now, at that time were all four defendants in the store?

A Yes, sir.

Q Now, where were you when you heard something?

A I had just stepped out of the door. Then they came running out.

Q First what did you hear?

A Something went bang.

Q You heard a bang?

A Yes.

Q Where did you hear the bang?

A Beg your pardon?

[fol. 161] Q Where did you hear that bang?
A At the store.
Q Inside the store?
A No, I was outside.
Q All right. You were outside the store?
A Yes, sir.
Q Where was the bang?
A It was in the store.
Q So then you—
A They came running out and got in the car, all four of them, and they drove off.
Q All right. Now, we are still talking about the four defendants?
A Yes, all four of them got in the car and drove off.
Q Is that the same car you saw before?
A Yes.
Q Had the car in the meantime moved or was it in the same place?
A It was in the same place. And they got in and took off.
Q Where was that car parked?
A Next door to the store is a residence, next door to the store.
Q On the same side as the store?
A Yes, sir.
[fol. 162] Q Did you notice who drove the car?
A The same one drove the car what tried to cash the check.
Q That is Cooper?
A I don't know him by name, sir.
Q You don't know their names?
A No, sir.
Q What happened to the car; it took off?
A Yes, sir.
Q Did you watch it?
A I watched it as far as 60th Street and it turned right.
Q I want to show you a picture. I'm going to show you a picture of an automobile.
THE COURT: Have all counsel seen those pictures?
MR. ROSEN: Yes.

MR. GORDON: Yes.
MR. WALTON: We have.
MR. MOORE: Yes.
Q BY MR. WARNBERG: And I will ask you if this picture fairly represents the car that you saw the defendants go into and drive away?
A Yes, sir.
MR. WARNBERG: May this first picture, your Honor, be marked People's Exhibit—
THE COURT: 10 for identification.
[fol. 163] MR. WARNBERG: 10 for identification.
Q And here is one more picture, the rear of an automobile.
A Well, I wouldn't know from the rear, sir.
Q In other words, you saw People's 10?
A Yes, sir.
Q Now, can you identify the people that were in the car before they got into the store?
A Yes, sir, because I had seen them before they went to the store.
Q In other words, these are the same four defendants?
A Yes, sir.
Q They were in the car before they went to the store?
A Yes.
Q And then after—in other words, you saw them go in the store, and run out, get in the car, and drive away; is that right?
A Yes, sir.
MR. WARNBERG: Cross examine.

CROSS EXAMINATION

BY MR. ROSEN:

Q Is that Mrs. Williams?
A Yes, sir.
[fol. 164] Q Before this date of December the 11th of 1964, had you ever seen this man right behind me, Mr. Bosby?
A I haven't seen any of them before the 11th of December.

[fol. 165] Q Now, this car that you saw that was parked, where was that parked? Where was the car parked?

A Before they went to the store, sir, it was parked across the street in front of my house.

Q What street is that?

A On East 61st Street right off of Wilmington.

Q How close to that car did you get?

A Right across the street.

Q How wide is the street?

A Oh, pretty wide.

Q Pretty wide street?

A Yes, sir.

Q So you just looked across the street and you saw this car and you saw four people in it?

A Yes, sir. I was sitting outside.

Q Where, on your porch or something?

A Yes, sir.

Q Looking at them?

A I wasn't just looking at them; anybody pass by I looked.

Q How long did you look at this car and its occupants?

A They didn't stay out there too long.

Q A minute or less?

A I couldn't go by the minute or nothing like that.

[fol. 166] Q Where was Mr. Bosby seated in the car?

A It was—sir, I don't know their names. I couldn't tell you.

Q Well, this man behind me, where was he seated in the car?

A In the back seat, he and the redheaded one.

Q In the back seat of the car?

A Yes.

Q Nearer you or further away from you?

A He was near me across the street.

Q Well, there were two people in the back seat?

A Yes, sir, two in the back, two in the front.

Q Well, of the two people that were in the back, was this man behind me closer to you or further from you as you were looking across the street?

A Well, just across the street. I don't know how far it would be.

Q Well, one of them was closer than the other one, wasn't he?

A What you mean?

Q Well, if two people are sitting side by side and you are looking at them, one of them is closer to you than the other one, isn't that right?

A Well, the way the car was parked, the bright one was sitting on it, opposite my house.

Q The which one?

[fol. 167] A The bright one.

Q Bright one?

A The bright one.

MR. ROSEN: What was that word?

REPORTER WERTHER: Bright.

Q BY MR. ROSEN: What do you mean by the bright one?

A Well, there was three dark and one red, so I don't know their names and I just can't tell you.

Q But, at any rate, you got a good enough look at them at this time to be able to identify them?

A Sure.

Q You believed at the time that you saw them that some time later on you're going to have to recognize them, is that right?

A Sure, yes, sir.

Q So you looked at them real close?

A Yes, sir. I love to look at people.

Q You remember all about them?

A Their faces.

Q What about their clothing? What were they wearing?

A Well, one had on a short dark coat.

Q A short dark coat?

A Yes, sir.

Q Which one had on a short dark coat?

[fol. 168] A The shortest one in the bunch.

Q Which one is that?

A I don't know their names.

Q Well, point him out.

A The short one right over on this side.

Q You mean—

A Yes, sir.
Q —the second man here?
A Right behind you.
Q The first man?
A Yes, sir.
Q He had on a long dark coat?
A Yes, sir.
Q You saw that in the car as you were looking at it?
A I saw him at the store in that coat.
Q But I'm talking about when you were looking at him in the car.
A I just seen their faces in the car. They were sitting smoking.
Q All four of them?
A Yes, sir.
Q So you just decided to remember them by their faces?
A Well, when I seen them, when I went around to the store, they was around there, quite naturally I did.
[fol. 169] Q I'm talking about when they are sitting in the car. You just remember their faces as they were sitting in the car?
A Yes.
Q You didn't notice their clothing at that time?
A No.
Q You didn't notice their size, either, did you?
A No. They were sitting down. I couldn't see their size.
Q Of course. But then some time later when you went into this store—how much later was it?
A Well, it wasn't too long.
Q How long is not too long?
A I didn't look at the time or nothing. My mother called me to go to the store, so I just got the money and went on to the store.
Q Five minutes, half an hour? How long?
A That I didn't pay any attention to.
Q All right. You went on into the store and you saw one man trying to cash a check that you had seen in the car before, is that right?
A Yes, sir.

[fol. 170] Q He was sitting where in the car, this person who was trying to cash the check?

A He was sitting under the steering wheel.

Q Behind the driver's wheel?

A Yes, sir.

Q All right.

Then you saw another man that was talking about buying a bottle of wine?

A Yes, sir, I saw him.

Q And you had seen him in the car before?

A Yes.

Q Was he seated in the car?

A In the back seat.

Q And then you saw two other men?

A Yes.

Q That came into the store?

A Mm-hmm.

Q And you recognized both of them as having been in the car?

A Yes.

Q No question in your mind but that the four men who you saw in the store were the same four men who were in the car?

A That's right.

Q You couldn't be mistaken about that?

A No, sir.

[fol. 171] Q Did you see four or five men in the car?

A I didn't see five. I seen four.

Q You told us here on direct examination when you were asked to describe these men in the car, you said four colored men and one man with red hair. Do you remember that?

A Yes, I do.

Q Well, do you mean that the man with red hair was a colored man?

A I don't know what he was, but I know it was three dark ones. I don't know whether he colored or what, all I know he was red and had his hair painted red.

Q But four men altogether?

A Yes, sir.

Q Not five?

A No.

Q Now, you told us that you gave some little girl a dime, did you, to buy something?

A I sure did.

Q Then you left the store?

A I walked out of the store.

Q Where did you walk to?

A Right outside by the Coca Cola bottles.

Q Where they have a Coca Cola box outside the store?

A Beg your pardon?

Q Did they have a Coca Cola box right outside the store?

[fol. 172] A That's right.

Q Did this girl to whom you had given the dime come out?

A Yes, she did, she came out screaming and hollering.

Q Now, when you heard this, something that sounded like a pop—

A Yes, sir.

Q —did it sound like a tire maybe blew out?

A I was so excited when she started screaming, I am going to tell you the truth, I don't know what it sounded like.

Q And this little girl came out?

A Yes, sir.

Q And after this girl came out these four men came out?

A Yes, sir.

Q You were still standing out there by the Coca Cola stand?

A Holding her, yes, sir.

Q And these four people went into that car that was parked across the street from your house?

A Yes, sir.

Q Did you get the license number of that car?

A No, sir.

Q Could you see the license number from where you

[fol. 173] were?

A I didn't take time to look at the license, I was so excited.

Q How about when you were sitting on your porch looking at that car across the street, did you take the license number?

A I didn't think to take the license number from across the street, because there is a lot of people parks across the street and it is a factory there and I don't take licenses because if I do, I'd be taking licenses all day.

Q You mean that is not unusual for four people to be sitting in a car?

A Colored people, sir.

Q Pardon?

A Colored people, because I hardly see colored people come down that street.

Q Is that a colored neighborhood?

A No, sir.

MR. ROSEN: All right, that is all I have.

CROSS EXAMINATION

BY MR. MOORE:

Q When you saw this car out there, ma'am, it was about fifteen minutes before you went in the store?

A I don't know, sir.

Q When you went in the store you saw two of these [fol. 174] men, the redheaded man and the tall man, standing across the street at the bus stop; is that right?

A Yes, sir.

Q And when you were inside the store Mr. Cooper here, you say, was attempting to cash his check; right?

A Yes, sir.

Q Some time after he was attempting to cash his check you saw Mr. Bosby come in and ask about a bottle of wine; is that right?

A That's right.

MR. MOORE: That's all.

THE COURT: Just a moment, ma'am, we have got two more lawyers who might want to ask you questions.

Mr. Walton?

CROSS EXAMINATION

BY MR. WALTON:

Q Well, Mrs. Williams, did you say you don't live in a colored neighborhood?

A No, sir.

Q You don't?

A No, sir.

Q You are colored yourself, aren't you?

A Yes, but I am only—it is just me and my mother and another lady, nobody else.

Q I don't say that to ask the obvious; I just want the [fol. 175] reporter to take down the fact of the matter, that you are the only colored family in the neighborhood.

MR. WARNBERG: Objected to as immaterial.

THE COURT: Overruled.

THE WITNESS: Just three colored families; my mother and me and a man and his wife, that's all.

Q BY MR. WALTON: Now, I am still not sure: how many men did you see, four or five?

A Just four.

Q And you thought they were all colored at that time, isn't that right?

A Three colored and, just like I say, I don't know whether he was white, Mexican or what. All I know, he was red with red hair.

Q Do you see anybody in this courtroom here in this back row with red hair?

A He didn't have it when I went to identify, but I still knew his face.

Q This was how far—how long before you went into the store?

A I really don't know.

Q Did you walk down to the store?

A Right, I always walk because I don't have a car.

Q When you were in that store did you see all four of these defendants in that store?

A I sure did.

[fol. 176] Q Do you know Mr. Serna?

A I have been knowing Mr. Serna over twelve years.

Q Did you see him in the store?

A Yes, sir.

Q Did you see him get into any sort of fight or argument?

A No, sir. He handed me the light bulb and he walked on back behind the counter.

Q Was this before or after the defendants were in the store?

A They was in the store when he walked back.

Q Incidentally, did you buy that quart of beer for yourself?

A I bought it for my mother. I don't drink, I used to.

MR. WALTON: I have nothing further, your Honor.

THE COURT: Mr. Gordon?

MR. GORDON: No questions.

MR. WARNBERG: Thank you.

THE COURT: You may step down; thank you, ma'am.

MR. WARNBERG: Mr. Flores, please. Maybe we need an interpreter.

THE COURT: I hope not.

MR. WARNBERG: Shall I ask? Maybe not.

THE COURT: I hope not; this would be a terrible time to get an interpreter without any warning.

[fol. 177] THE BAILIFF: Your Honor, Mr. Flores does not speak English.

MR. WARNBERG: I am sorry. Let me pass him and call instead Stella Rodriguez, then, tomorrow morning—

THE COURT: All right, Mr. Clerk, have an interpreter here, please, at 9:45.

I assume it is a Spanish interpreter that you want?

MR. WARNBERG: Yes; thank you, Judge.

THE BAILIFF: Raise your right hand, please, and face the clerk.

THE CLERK: You do solemnly swear that the testimony you may give in the case now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I will.

STELLA RODRIGUEZ,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

THE CLERK: Be seated, please, and state your name.
THE WITNESS: Stella Rodriguez.
THE CLERK: Spell you last name, please.
THE WITNESS: R-o-d-r-i-g-u-e-z.

[fol. 178] DIRECT EXAMINATION

BY MR. WARNBERG:

Q Mrs. Rodriguez?
A Yes.
Q Are you acquainted with the grocery store at 6126 South Holmes Avenue?
A Yes, I usually go there, but I live on the other side of the tracks from it.
Q About how far from the store—
A It is about two blocks.
Q —the store do you live?
A It is two blocks.
[fol. 179] Q Now, I'm directing your attention to last December the 11th, 1964, and I will ask you whether or not you were living there at that time.
A Yes, sir, I was living there.
Q That afternoon did you see a Mercury automobile in front of your house?
A Yes, I did. It was making—what called it to my attention, it was making some kind of a noise, and the motor was running, and right away I figured that they—
MR. WALTON: Just a minute—
THE COURT: Don't tell us what you figured. Just answer the question, please. Listen to the question.
MR. WARNBERG: Just wait a minute.
THE COURT: Just answer the question and don't add anything else or don't tell us what you thought or what you figured, just what you saw. All right?
THE WITNESS: Okay.

Q BY MR. WARNBERG: Let me show you People's Exhibit 10 for identification, and I will ask you whether or not the picture of that car looks like the Mercury automobile you saw?

A Yes.

Q Now, before you saw the Mercury car, did you see another automobile?

A There was another car there.

Q What make of car was the other one?

[fol. 180] A Well, I don't know—remember the make of it, but there was another car there.

Q In other words, the other car was first?

A Uh-huh, yes.

Q About what time did you notice that other car?

A Gee, I don't know .I didn't look at the clock or anything.

Q Was it daytime?

A Yeah, it was during the day, yes.

Q Would you say in the afternoon?

A Yes, around in the afternoon.

Q Did you notice someone in the other car?

A Yes, there was someone in the car.

Q Was that person alone?

A Yes, he was alone.

Q How long did you see the other car, approximately?

A Well, gee, about five minutes, no later than five minutes I had seen it.

Q And was there someone sitting behind the wheel?

A Yes, someone was sitting behind the wheel.

Q Can you describe that person?

A No, I can't.

Q All right. Then did another car come to the scene?

A Yes, another car drove up and—

[fol. 181] Q Is that the one that we have a picture of in People's 10?

A Uh-huh

Q Did you see some people in that car?

A Yes, uh-huh.

Q Who did you notice in that car?

A Well, I noticed there was a white boy and there was these three colored ones.

Q Did you know those people? You didn't know them?
A I didn't know them. I didn't know who they were or anything.
Q What did that car do with the three colored boys and the white man?
A They switched cars. They came—they got off of one car and they went into the other car, and then they drove off.
Q Now, which car did they go into?
A It was that one—the other one that was there waiting for them.
Q Now, let's go back to this People's Exhibit No. 10. Have you described that as a two-tone car?
A Yes, it was two-tone.
Q Now, did they go into People's 10?
A No, it wasn't the two-tone that they had gone into.
[fol. 182] Q In other words, they went into the other one?
A They went into the other one.
Q All right. Then what happened?
A Then they just left. And there was this other fellow that stayed there in the car with the motor running.
Q Did you know that fellow that stayed in the car?
A No, I don't.
Q Can you identify any of the other people that switched the cars?
A Well, this one, the first one.
Q In other words—
A Because I seen him when they was trying—when they came back there, they were trying to go into the car.
Q Well, first let me do this. Before they took off, could you identify anyone in there?
A Oh, no, huh-unh.
Q That car left?
A Uh-huh. And the other one stayed.
Q And the other one stayed. Now, did you keep your eye on the car?
A Yes, because it was running and making some kind of a sound, you know; the car had something wrong with it, I guess.

Q Did you get license numbers of the cars?
A No, I didn't.
Q How long did that car stay there?
[fol. 183] A Gee, I couldn't say. Not too long; it wasn't there too long.
Q And then what happened?
A Well, then, after that I heard some brakes, something like brakes, and then I seen this car drive up, the other car, you know, drive next to this one. They were both—

THE COURT: By "this one," you are talking about the one in People's 10 for identification, the picture you saw?

THE WITNESS: Uh-huh, yes. And they were like this, and then—

Q BY MR. WARNBERG: Wait a minute. Like this, side by side?
A Well, you see, they were not side by side, but they were almost together, you know; the cars were almost bumper to bumper. And they got off and they all tried to get in the other car all at one time.
[fol. 184] Q Can you for the purpose of the record, identify these cars by any make?
A I don't know the makes of them or anything.
Q Would it help if we call, say, People's Exhibit No. 10 a Mercury automobile?
A Yes.
Q Would that help?
A Yes.
Q Was the other car the same make or a different make?
A No, it was a different make.
Q It was a different make?
A Yes.
Q All right. Now, in your description of the car that stayed, was that the Mercury car or the other car?
A It was the other car.
Q The other car?
A Uh-huh.
Q And the car that left was the Mercury, is that right?

A Uh-huh.

Q All right. When the Mercury car came back, how many people were in the car?

A There was four.

Q Can you describe those individuals for us?

A Well, I just seen the white boy and this first one [fol. 185] here is all.

Q Are you now indicating one of the defendants in this case? Which one are you pointing to?

A Oh, this first one right here.

THE COURT: In the first row or the second row?

THE WITNESS: The second row.

THE COURT: The second row, the first men?

THE WITNESS: Yes.

THE COURT: Indicating the defendant Bosby.

Q BY MR. WARNBERG: All right. Now, what happened when the Mercury car came back and Defendant Bosby got out of the car?

A Well, they all tried to get in, and then I seen—

Q Get in where?

A Well, they were parked, you know, like I told you.

Q Back to back?

A Uh-huh.

And then they were going to switch cars, and they all tried to get in the same side of the door by the street.

Q Were they trying to get into the other car?

A Into the other car. They were all trying to get in the same side.

Q There was a person in the other car all the time?

A The other person had already come out.

Q Where did he go?

[fol. 186] A He was standing there with the door open.

Q In what car?

A Where they were switching cars, you know, the first one.

Q The same car that he was sitting in?

A Uh-huh.

Q All right. Then the other four people came over to that car?

A Yes.

Q What happened?

A Then they went straight out Florence—
Q Did they all get into that car?
A Yes, except that one man that was standing by the door. He went to the other car.
Q That was the man that was sitting in the other car?
A Yes.
Q He went back to the Mercury?
A Yes.
Q How about Defendant Bosby, in what car did he go?
A Went into the first car, the one—
Q With the other three?
A With the other three.
Q Can you identify those other three?
A No, I can't. I don't know—I didn't see them very well.
[fol. 187] Q Can you tell us if they were colored folks?
A Yes, they were colored.
Q Or white?
A And one was white.
Q One white man and how many colored?
A There was four colored and one white.
Q And the man that was sitting in the car all the time, was he colored?
A He was colored.
Q And then what happened, both cars took off?
A Yes, they followed one another.
Q How long was that first car there before the second car come up to the scene, approximately?
A Oh, well, about no later than five minutes he was there.
Q And while the Mercury was gone, did the man that was sitting in this other car do anything?
A No. He was just there with the car running, sitting there.
Q What do you mean, the motor running?
A Yeah, the motor was running in the car. It was just sitting there.
MR. WARNBERG: Cross examine.

[fol. 188] CROSS EXAMINATION

BY MR. ROSEN:

Q Is that Mrs. Rodriguez?

A Yes.

Q Where were you when you were watching these two cars?

A I was in the kitchen, and the kitchen window leads right by the street. It is right next to the street.

Q Were these cars across the street or on your side of the street?

A Across the street.

Q About how far away would you say in feet, in terms of feet, from where you were standing?

A Gos, I wouldn't know. I'm not too—

Q Well, as far as from where you are sitting to the end of the courtroom here or farther?

A No, about from here to the doors.

Q From here to the doorway?

A Yes.

THE COURT: Thirty-eight to forty feet.

Q BY MR. ROSEN: All right. As I understand it, as you were there this afternoon—

What date was this, by the way?

A I don't remember.

Q You don't remember. What month was it?

A December; it was in December.

[fol. 189] Q What year?

A '64.

Q What day of the week?

A Gee, I don't remember.

Q You don't remember that?

A No.

Q But you do remember a car pulling up with one person in it stopping and parking across the street from you?

A Yes.

[fol. 190] Q You can't describe that car?

A No.

Q As I understand it, that car was there for about five minutes when another car came up; is that right?

A Yes.

Q Let's call the first car that stopped there for five minutes Car A and the second car, Car B. Do you follow that?

A (Witness nods head.)

Q You will have to answer out loud.

A Yes.

Q So, Car A was there for about five minutes when Car B came up?

A Mm-hum.

Q How many people were in Car B?

A There was four.

Q And did Car B stop next to Car A?

A Yes.

Q Did the people get out of either car?

A They switched cars.

Q They switched cars, so the four people who were in Car B now got into Car A?

A Mm-hmm.

Q Is that right?

A (Witness nods head.)

THE COURT: Don't shake your head, ma'am, you [fol. 191] have to answer yes or no.

THE WITNESS: Yes.

THE COURT: Thank you.

Q BY MR. ROSEN: And the person who was in Car A got into Car B?

A Yes.

Q Now, Car B is in the car that you say looks like the photograph there, People's 10?

A Yes.

Q And then the four people who were in Car A drove away?

A Yes, they drove away.

Q And the one person who was in Car B stayed there?

A Yes, he stayed there with the motor running.

Q Well, then, that would be the car in the photograph as being the one stayed there with the motor running; is that right?

A No, it was the other one— no, excuse me, it was this one that stayed there.

Q With the motor running?

A With the motor running.

THE COURT: She is indicating People's 10 for identification.

MR. ROSEN: Yes, all right.

Q We are calling that Car B, then, now, that stayed [fol. 192] there?

A Mm-hum.

Q Then some time later the four people in Car A came back?

A Yes.

Q About how much later?

A Oh, gee, about five or ten minutes later.

Q And they stopped right in front of Car A?

A (Witness nods head.)

Q Excuse me, they stopped in front of this two-tone car that is in the picture?

A Yes.

Q And again they switched cars?

A Yes, they switched cars.

Q What color was this car that had a two-tone?

A There were dark green and another one like—not mint green, but another green.

Q Two shares of green?

A Two shades of green.

Q Now, you have pointed out Mr. Bosby here as being one of these people that were in the car where there were four people; is that right?

A Yes.

Q Or was he the one who was waiting there for five or ten minutes with the motor running?

A No.

[fol. 193] Q What was there about him that makes you believe that you can identify him and not the other three people that were in that car?

A Well, I don't know, something about his hair, his head, you know, from his hair right here.

Q From his hair?

A Yes, this little thing he has got up here, that is what I remember about him.

Q That is why you say it was him?

A Yes.

Q Because of the hair line; is that right?

A Yes.

Q You didn't get any license number of either of these cars?

A No, I didn't.

Q Who was the first person that you told this business of these cars and the changing of cars? Who did you tell that to the first time?

A The first time I told my father-in-law.

Q When, the same day?

A The same day.

Q Did you report this to the police or did they come out to talk to you about it?

A No—well, then my father-in-law called my husband and my husband went to the police and told them.

MR. ROSEN: All right, that is all I have.

[fol. 194] Mr. Moore?

MR. MOORE: I have no questions.

THE COURT: Mr. Walton?

CROSS EXAMINATION

BY MR. WALTON:

Q Mrs. Rodriguez, when was it that you went to the police?

A That same night that it happened.

Q You called the police or did you actually go down to one of the stations?

A Well, my husband went down to the station and they had him take me down there, so I had to go down there.

Q You know where the store is at 6126 South Holmes?

A Yes, I do.

Q How far away from that store is your place?

A Well, it is on the other side of the tracks and it would be about two blocks away from there.

Q Is this the other side of the Randolph tracks or the Slauson tracks?

A The Randolph tracks.

Q So that would be roughly five or six blocks away, is that correct, from the store?

A Well, no, it would be two blocks because, you see, they go like this and the tracks are right in the middle [fol. 195] of the streets, so it is just two blocks, and then go up that way.

Q Well, you are two blocks from Holmes, aren't you?

A Yes, uh-huh.

Q And Randolph is a couple of blocks from where this market is, isn't it?

A Yes, uh-huh.

Q So you are about four blocks away, then, if you were walking the distance; is that correct?

A Wait a minute, no, it is not the Randolph tracks, it is the Slauson tracks—not the Slauson tracks—let me think—well, I don't know the name of the tracks there, but there is a tracks there between Holmes and where we live and the converse.

Q There is a school nearby there, isn't there?

A Yes, there is.

Q All right, and that school is at the corner of Randolph and Holmes, isn't it?

A Yes.

Q Where did you live in relation to the school?

A I live two blocks from that school.

Q West of it or east of it?

A West—I think it is west.

Q So you live maybe a half a mile from the store?

A No, it is not a half a mile.

[fol. 196] Q About half, is it?

A It is, well, like I say, it is just two blocks. I get there in five or ten minutes from the store walking.

Q But when was it that you first realized something unusual had happened at that store?

A Well, when my father-in-law came home from work he told me.

Q What time was that?

A That was about 3:00.

Q Was that before—strike that.

How long after you had seen these fellows go into a car was that?

A Oh, it was about, well, somewhere in between there, between there and a half an hour—in between there, between 2:30 and 3:00.

Q You are positive you saw five people?

A Yes.

Q And two cars?

A Yes.

Q No question in your mind about that?

A Pardon?

Q There is no question in your mind about that?

A No.

MR. WALTON: I have nothing further.

THE COURT: Mr. Gordon?

MR. GORDON: No questions, your Honor.

[fol. 197] THE COURT: Mrs. Rodriguez, did you notice anything about anyone of the defendants—or, anyone of the persons that you saw that stood out?

THE WITNESS: Well, just the white one. He had red hair, that's all.

THE COURT: All right, any further questions?

MR. WARNBERG: No further questions, your Honor.

THE COURT: Further cross?

Thank you, you may step down, ma'am.

Gentlemen, will there be any need for any of the witnesses who testified today? May they be excused?

MR. WALTON: No objection.

MR. GORDON: No objection.

THE COURT: Mr. Moore?

MR. MOORE: No, your Honor.

MR. ROSEN: No objection.

MR. WARNBERG: No objection.

THE COURT: Ladies and gentlemen, we will recess at this time until tomorrow morning at 9:45. For the purposes of emphasis, I just want to remind you again about the admonition that you are not to discuss this case among yourselves or with anyone else on any subject connected with the trial.

Gentlemen, court is still in session and I am talking to the jury and I would appreciate it if you would wait until I am finished.

[fol. 198] Not to discuss this case among yourselves or with anyone else on any subject connected with the trial; you are not to form or express an opinion with respect to the case until it has been finally submitted to you for your decision.

Recess until 9:45.

The witnesses who have already testified today may be excused.

(Whereupon the afternoon adjournment was taken until 9:45 o'clock a.m., Tuesday, June 22, 1965.)

[fol. 199] LOS ANGELES, CALIFORNIA
TUESDAY, JUNE 22, 1965 10:17 A.M.

THE COURT: Good morning, ladies and gentlemen.

Mr. Warnberg, you may call your next witness.

MR. WARNBERG: Deputy Anderson, may we call as our next witness.

THE BAILIFF: Raise your right hand, please, and face the Clerk.

THE CLERK: You do solemnly swear that the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: I do.

* * * * *

[Testimony of Richard O. Anderson—omitted in printing]

[fol. 229] MR. WARNBERG: Call Mr. Montgomery.

THE CLERK: Will you raise your right hand, please. You do solemnly swear that the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

JAMES L. MONTGOMERY,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated, please. State your name, please.

THE WITNESS: James L. Montgomery, M-o-n-t-g-o-m-e-r-y.

[fol. 230] DIRECT EXAMINATION

BY MR. WARNBERG:

Q What is your occupation, Mr. Montgomery?

A Deputy Sheriff of Los Angeles County, attached to the Sheriff's Criminalistics Laboratory, Firearms Identification Section.

Q In that capacity you examine firearms and bullets?

A Yes, sir, for the last four years.

Q And during that time in your examination you are able to determine if a bullet is spent from a particular revolver?

A Yes, many times.

Q Are you able to do that under examination of the bullet?

A Under microscopic examination, yes, sir.

Q Let me show you People's Exhibit 11 for identification. Have you seen this exhibit before?

A Yes, I have.

Q Were you able to make an examination of that bullet?

A I examined the bullet, but the sides of the bullet were too badly mutilated for any possible comparison.

Q So you could make no examination?

A No, sir.

Q You could not make a test firing?

[fol. 231] A No comparison. I made an examination but no comparison.

Q Because of the condition of the bullet, is that correct?

A That's correct, yes, sir.

MR. WARNBERG: All right. Cross examine.

MR. ROSEN: Excuse me just a minute. Your Honor, may I see the exhibits.

CROSS EXAMINATION

BY MR. ROSEN:

Q Officer, I will show you People's Exhibits Nos. 3—

THE COURT: No, sir, I don't think so. 6 and 7.

MR. ROSEN: 6 and 7.

THE COURT: 6 is the smaller gun, 7 is the larger one. Maybe at the preliminary.

MR. ROSEN: Yes, your Honor.

Q All right, People's Exhibit 6, the smaller of the guns, can you tell me what caliber this gun is?

A Yes, that is a .38 Special caliber.

Q Can you tell me what the caliber of the bullet is, People's Exhibit 11?

A People's 11 is a .38 caliber bullet. Whether it is a .38 Special or a .38 Smith & Wesson, I have no idea, because the weight is 147 grains and it could be [fol. 232] either.

Q It could be either?

A Yes, sir.

Q I take it, then, that it is possible for the bullet, People's Exhibit 11, to have been shot out of the gun, People's Exhibit 6? It is possible?

A It is possible, that's correct.

Q But the bullet itself is too mutilated for you to make an exact comparison and conclusion on that?

A That's correct, yes, sir.

Q What is the caliber of the other gun, People's Exhibit 7?

A The caliber of People's 7 is a .22 Long Rifle caliber.

Q So it would not be possible for People's 11 to have been fired out of the gun, People's 7?

A No, sir, it's not possible.

Q But it would be out of People's 6?
A That's correct, yes.
MR. ROSEN: Thank you. That's all.

CROSS EXAMINATION

BY MR. MOORE:

Q If a bullet is fired, sir, the powder moves how far from the gun, from the bullet?
A It depends on the type of gun and the caliber and [fol. 233] the barrel length of the gun as to the range of your powder pattern.
Q A .38 caliber, how far does the powder go?
A On this particular gun, with a two-inch barrel, you'd probably get a powder pattern or some powder residue up to 20, 24 inches.
[fol. 234] Q Twenty-four inches—
A Yes.
Q Would be the most?
In other words, if the gun was fired from any greater, there would be no powder wherever the bullet hit?
A Probably not, no.
MR. MOORE: That is all, thank you.
THE COURT: When you said "this gun," sir, which gun were you referring to?
THE WITNESS: The .38 caliber Special weapon.
THE COURT: People's No. 6 for identification.
MR. WALTON: I have no questions.
THE COURT: Mr. Gordon?

CROSS EXAMINATION

BY MR. GORDON:

Q Assuming that 7 had been used, what would be your powder range?
A With this barrel length, probably between two and three feet.
MR. WALTON: Excuse me; I object to that question; there is no foundation for that kind of a question and it is certainly an improper form of a hypothetical question.

THE COURT: Objection sustained.

The answer will be stricken, the jury is instructed to disregard it.

[fol. 235] Q BY MR. GORDON: Can you give us your opinion, sir, whether or not the mutilation of a bullet such as you have discovered in People's Exhibit 11, could occur from striking a body or would it have to be a bony substance or some other substance?

A The mutilation could occur by going through a body, yes. It appears that this bullet has probably struck a hard surface, a bone, or possibly wood or plaster.

Q That is, you would ordinarily conclude that it had struck a hard surface, then, that would cause the mutilation?

A With this particular bullet, yes.

MR. GORDON: No further questions.

MR. WARNBERG: No.

THE COURT: Thank you, sir, you may step down. If there is no objection, you may be excused.

MR. WARNBERG: Mr. Flores.

We will need the interpreter.

THE COURT: Mr. Alba has been waiting patiently all morning.

THE CLERK: You do solemnly swear that you will well and truly interpret the English language into the Spanish language and the Spanish language into the English language in the cause now pending before the Court, so help you God?

THE INTERPRETER: I do.

THE COURT: State your name for the record, please.

[fol. 236] THE INTERPRETER: Jose B. Alba, A-l-b-a.

THE CLERK: You do solemnly swear that the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: Yes.

JOSE LUIS FLORES,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

THE CLERK: Be seated and state your name, please.
THE WITNESS: Jose Luis Flores.
THE CLERK: Spell that, please.
THE WITNESS: My name?
THE CLERK: Yes.
THE WITNESS: Jose Luis Flores.
THE COURT: How do you spell the middle name, just the middle name?
THE WITNESS: L-u-i-s.

DIRECT EXAMINATION

BY MR. WARNBERG:

Q Mr. Flores, last December 11, 1964 were you working near Mrs. Robbins' grocery store?
A Yes.
Q Where were you working?
[fol. 237] A Inside.
Q Doing what?
A Bread.
Q In other words, you were working next door to the grocery store?
A Yes.
Q In a bakery store?
A Yes, bakery.
Q Now, that afternoon did you notice an automobile parked in front of the store?
A A little small girl ran by crying, friend of mine—
MR. WALTON: Move the answer—
THE COURT: The answer will go out. The jury is admonished to disregard it.
Mr. Flores, just listen to the question carefully, please, sir; just answer the question.
Mr. Reporter, read back the question, please.

(Record read.)

THE WITNESS: Yes.
Q BY MR. WARNBERG: Let me show you People's Exhibit 10 for identification and I will ask you if that looks like the car you saw parked in front of the store?
A Yes, it looks like it.

Q About what time was it that you saw that automobile parked there?

[fol. 238] A I don't remember exactly.

Q Do you remember what make of car it was?

A Seemed like it was a Ford, more or less.

Q And the color; do you recall the color, then?

A Seems it was a red car.

Q Now, was there anyone in the car when you first saw it?

A No.

Q And about how long did you see that car parked at that location?

A For about five minutes, because after I saw them come out running and got into it.

Q Now, who did you see come out running?

A A white and three Negroes.

Q Did you see where they came from?

A Yes.

Q Where?

A From the liquor store.

Q That was Mrs. Robbins' store?

A Yes.

Q That is 6126 South Holmes Avenue?

A Yes.

Q Had you seen those individuals any time just before that?

A No.

Q Can you identify those three Negroes and one [fol. 239] white?

A No, I didn't notice them very well.

Q Was there any particular feature about any of them that you noticed in particular?

A No, only the white had red hair, that is the only thing I saw.

Q Now, what did those four people do as they ran from the store?

A They boarded the car right away and left.

Q What did you do?

A I became suspicious and I took the license plate.

Q Did you write that down on something?

A Yes, in a paper bag.

[fol. 240] Q Let me show you a paper bag with some writing on it, and I will ask you if you recognize that?

A Yes.

Q Is that the license number you wrote down?

A Yes.

Q Did you write down the numbers KCY 482?

A Yes.

MR. WARNBERG: May the paper bag and the numbers, Your Honor, be marked—

THE COURT: 13 for identification.

Q BY MR. WARNBERG: What did you do with this envelope that you wrote down the license number on?

A I gave it to my boss.

Q All right. Now, let me show you one more picture, appears to be the back view of an automobile. Do you recognize it?

A I didn't see it from the back view. I was taking down the license plate when they left.

Q All right. You hadn't seen those individuals before that?

A No.

MR. WARNBERG: Cross examine.

CROSS EXAMINATION

BY MR. ROSEN:

Q Mr. Flores, where do you work?

[fol. 241] A Cristina Bakery, 6116 Holmes Avenue.

Q On this date that you were telling us about, when was it that you took this license number down?

A How long ago was it?

Q What month?

A What month, the month?

Q Yes.

A It was in December, wasn't it?

Q It was in December, was it?

A I don't remember. It was a long time.

Q A long time ago?

A Yes.

Q What year?

A In 1964.
Q And what day?
A I don't remember.
Q Where was this car parked?
A Close to the bakery.
Q On what street?
A Holmes Avenue.
Q Where were you when you took the license number?
A Outside by the door.
Q By the door of the car?
A No, of the bakery.
Q How far?
A About ten feet, more or less.
[fol. 242] Q Did you get a front license or a rear license?
A Both of them.
Q Which was it that you wrote down, the front one or the rear one?
A The front one.
MR. ROSEN: All right, that's all that I have.
MR. MOORE: I have no questions.
MR. WALTON: No questions.
MR. GORDON: No questions.
THE COURT: Thank you, sir. You may be excused.
MR. WARNBERG: May we call Officer Vaughn.
THE CLERK: You do solemnly swear that the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?
THE WITNESS: Yes, sir.

CHARLES WILLIAM VAUGHN,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated, please. Will you state your name, please.
THE WITNESS: Charles William Vaughn, V-a-u-g-h-n.

[fol. 243] DIRECT EXAMINATION

BY MR. WARNBERG:

Q What is your occupation?

A Deputy Sheriff, Los Angeles County, assigned to Headquarters Detective Bureau, Homicide Detail.

Q And are you one of the investigating officers in this case?

A Yes, sir, I am.

Q Your first investigation was going to the scene, is that about it?

A Yes, sir, that is correct.

MR. WALTON: Your Honor, prior to any further testimony of this witness, I have an objection to make to his testifying at all in that the exclusionary order made by the Court appears to have been violated.

MR. WARNBERG: Just a minute, your Honor—

MR. WALTON: Now, I don't know how much of this your Honor desires to hear—

THE COURT: Sir, first of all, you saw him sitting there the entire time, and I think that you knew that he expected to be called.

Secondly, he was taking the place of the other investigating officer. You made no objection to him sitting here.

MR. WALTON: Your Honor, I have no idea whether he's going to testify or not until he is called. Now, I'm not—

[fol. 244] THE COURT: All right, sir. The objection is overruled.

MR. WALTON: Well, may I make a record? I don't feel that I have made a record. I merely made sort of a tentative showing.

THE COURT: All right, you may approach the bench with the reporter.

(The following proceedings were had at the bench:)

THE COURT: So far as I'm concerned, Mr. Walton, the reason I made my remark is, I don't think your objection is in good faith, because you knew—you have been told that Vaughn was going to testify. We have had dis-

cussions in chambers relative to his testifying, and the reason that he was to be told that certain statements attributed—strike that—he was to be told that he was not to mention the co-defendants when he mentioned certain of the testimony or the admissions of each of the defendants, he was not to mention the other defendant.

You knew very well that he was going to be called. And I think that it is certainly in bad faith, and I'm really astonished that you would do this.

MR. WALTON: Well, then, I certainly have to take exception to your Honor's remarks about this being made in anything but absolute good faith, because that is the only purpose of it.

[fol. 245] THE COURT: Didn't you see Vaughn sitting here all this time?

MR. WALTON: Yes. Let the record show there are facts which haven't been shown yet.

THE COURT: The record—

MR. WALTON: I don't know—

THE COURT: Just keep your voice down, just keep your voice down.

MR. WALTON: That your Honor made an exclusionary order prior to the time that any testimony was presented. Now, an officer whom I presumed to be Sergeant White first sat there next to the District Attorney.

THE COURT: That's right.

MR. WALTON: Presumptively is the investigative officer.

MR. WARNBERG: There are two investigating officers.

MR. WALTON: Well, there is the investigating officer exception to the exclusionary order.

Now, my memory is—and this is where I may be a little hazy—that Sergeant White sat there the entire first morning. That at that afternoon Sergeant Vaughn came in and has occupied that chair ever since.

Now, I don't know when I can make the objection, your Honor.

THE COURT: You can make it as soon as you see Vaughn sitting there. You knew he was going to testify—

[fol. 246] MR. WALTON: How can I object to his testifying—

THE COURT: Well, you can object to his sitting there. The fact that you knew he was going to be called—you can't tell me that you didn't know he was going to be called, can you, Mr. Walton, since we have been discussing this in chambers ever since the very beginning of this trial.

MR. WALTON: Well, I don't know. It's a matter of timing and—

THE COURT: It is a matter of good judgment and faith with this court, I'm sorry, sir.

MR. WALTON: Well, I certainly take exception to the remarks. I feel I have to make it when—

MR. WARNBERG: Yes, but, Mr. Walton, you recall at the very beginning I listed a number of witnesses that I was going to call and his Honor asked me to name them, and Sergeant Vaughn was named.

MR. WALTON: So was Sergeant White and so was—

MR. WARNBERG: All right.

THE COURT: Why didn't you call it to the Court's attention that Vaughn was here and you don't know about this. "Is he here as an investigating officer? Do I understand he is going to testify?"

Well, irrespective of that, Mr. Walton, do you want to make any further record?

MR. WALTON: No, that is a sufficient record, I feel.

[fol. 247] THE COURT: All right. Your objection is overruled.

(The following proceedings were had in open court in the presence of the jury:)

THE COURT: You may proceed, sir.

Q BY MR. WARNBERG: Now, Officer Vaughn, what date was it you went to the scene?

A December the 11th, 1964, approximately 3:05 p.m.

[fol. 248] Q Did you go to Mrs. Robbins' store?

A Yes, sir, we did.

Q 6126 South Holmes Avenue?

A Yes, sir, that is correct.

Q And your investigation there was just looking it over, is that about it?

A It was a little more than looking it over.

Q All right, tell us briefly what you did.

A Made—

Q Let me ask you this, it might save some time: were you there with Deputy Anderson?

A Yes, sir, he was there when Sergeant White and I arrived.

Q Just briefly tell us what you did.

A We examined or observed the victim lying on the floor behind the refrigerator; we examined the entire premises for evidence, conversed with the various witnesses, including the various officers, and directed several photographers and fingerprint technicians to photograph and fingerprint the entire store for fingerprints; gathered several pieces of evidence; in substance, that is it.

Q All right.

Now, eventually did you get a license number of an automobile?

A Yes, sir, I did.

[fol. 249] Q From whom did you obtain that?

A From Deputy Joseph Brown, the preceding witness, and Deputy Anderson.

Q Is that People's Exhibit 13, that you got?

A Yes, sir, it is.

Q Now, after you got that number, license number, what did you do?

A I detailed Detective Rudolph Silvas and Harvey Turrentine to proceed to Gaffers & Satlers plant at 4851 South Alamede Street, City of Los Angeles, to obtain some information pertaining to the license number that was on this piece of paper.

Q At that time did you go?

A Not at that time; I did later in the evening.

Q About what time did you go to Gaffers & Satlers?

A Approximately 9:20 p.m. on the 11th of December, 1964.

Q All right.

Is that Gaffers & Satlers Company, is that the location—

A Yes, sir, 4851 South Alamede Avenue.

Q About how far from the location of 6126 South Holmes?

A Approximately a mile and a half to two miles.

Q When you got there what did you do?

A Had a conversation with Detectives Turrentine and [fol. 250] Silvas.

Q Don't give us the conversation.

After you talked to them what did you do?

A. I observed a green '55 or '56 Mercury, green and white, parked near the guard shack at Gaffers & Satlers plant. This Mercury at that time bore the license number KCY482.

Q Is that the Mercury as depicted in People's Exhibit No. 10?

A Yes, sir, it is.

Q Let me show you just one more picture—I don't believe this one has been marked yet—but, is that also a fair representation of the rear view of that Mercury?

A Yes, sir, it is.

Q That bears license number KCY482?

A Yes, sir.

MR. WARNBERG: May it, your Honor, be marked at this time, number—

THE COURT: 14.

Q BY MR. WARNBERG: All right, go ahead, Officer—you saw the car there?

A Yes, sir, I did.

Q Where was it parked?

A Parked on the north side of—I don't recall if it is 48th or 49th or 50th Street, but it was adjacent to the guard shack, directly east of the guard shack at the Gaf- [fol. 251] fers & Satlers plant.

Q Now, eventually did you see some person there?

A Yes, sir, I did.

Q Who did you see?

A Mr. Cooper.

Q Is that the defendant Cooper in this case?

A Yes, sir.

Q Where was he when you first noticed him?

A He was walking easterly in the vicinity of the guard shack, accompanied by another gentleman.

Q What did you do?

A I asked, in substance, Mr. Cooper what his name was. He informed me, "Gilbert Cooper."

I asked him if that was his car and he stated, yes, that it was.

Q What car are you talking about?

A The one depicted in People's 8 and People's 7—

THE COURT: No.

THE WITNESS: Excuse me, People's 14 and People's 10.

MR. MOORE: At this time, your Honor, I will object to any further conversation without a proper foundation.

THE COURT: Ladies and gentlemen, I will excuse you at this time and ask you to return at 1:45. Remember the admonishment, please.

Thank you.

(The jury leaves the courtroom.)

[fol. 252] THE COURT: The record may indicate the jury has left the courtroom.

Do you wish to take the witness on voir dire, Mr. Moore?

MR. MOORE: Yes, your Honor.

VOIR DIRE EXAMINATION

BY MR. MOORE:

Q Officer, what time did you arrive at this plant?

A Approximately 9:20 p.m.

Q And when you got there you talked with some other officers?

A Yes, sir, that is correct.

Q That was relative to an automobile?

A Yes, sir.

Q What information did you have about an automobile obtained from those officers?

A That it was parked at the location bearing the license number that was given to us from other witnesses.

Q Did you then look at the car or check the car in any way?

A Yes, sir, I did.
Q What did you determine?
A Determined the front and rear license was KCY482.
Q And you checked the interior of the car?
A No, sir.
[fol. 253] Q Did you check the registration of the car?
A I don't believe we entered the car whatsoever at that time.
Q Well, did you see the registration before entering the car?
A I do not recall, counsel, if I did or not.
Q You mean you may have?
A I may have, yes, sir.
Q And did you note who it was registered to?
A I do not recall on that.
Q Well, did you determine it was registered to Mr. Cooper?
A I determined that it was not registered to Mr. Cooper.
Q And was that before you entered the car or after?
A Before we entered the car.
Q And was that before you saw Mr. Cooper for the first time?
A Yes, sir, it was.
Q And how was your attention directed to Mr. Cooper?
A I observed Mr. Cooper walking in the vicinity easterly towards the guard shack at the Gaffers and Satlers plant.
Q Did you have a description of him in some way?
A Not of him, particularly; of a suspect and suspects, yes, sir.
[fol. 254] Q Well, had you checked with the plant about a suspect who—that is, an employee who fit the description of a suspect?
A No, sir, I did not.
Q Did the other officers?
A I believe they did.
Q Did they inform you of that?
A There was a conversation that pertained to a person by the name of Gilbert who was possibly employed at Gaffers & Satlers.

Q What did they tell you that they had determined about that person?

A The officers made inquiry on a Gilbert—the last name I do not recall; it was not Cooper.

Q Clark, was it?

A Yes, I believe it was. And that there was no person by that name employed at Gaffers & Satlers plant, that one particular facility.

Q Did they determine that a Negro worked there that fitted the description of one of the suspects?

A I do not recall on that, counsel.

Q Before talking to Mr. Cooper did you stop and talk to other persons in that area?

A Yes, sir.

Q Inquiring if they owned the Mercury?

A No, sir.

[fol. 255] Q Mr. Cooper was the first person you inquired about that?

A No. I conversed with a Pinkerton security officer, but I do not recall if he gave us any information as to who actually owned the vehicle or not.

Q Before talking to Mr. Cooper, had you had information that that car belonged to him or that he drove that car?

A No, sir, we had information that it was registered to a Caucasian living in the County of Riverside.

Q Did you see other Negroes walking in that area before you talked to Mr. Cooper?

A Yes, sir.

Q Did you question any of those persons?

A Pardon?

Q —of those persons?

A I do not believe I did.

Q What was your purpose in stopping Mr. Cooper?

A He and the companion he was with at that time were similar to the description to the persons that I received information about pertaining to the robbery and alleged murder.

Q What were the descriptions that these men seemed to fit?

A The fact that Mr. Cooper was six foot or thereabouts, and the other gentleman that was with him was somewhat shorter.

[fol. 256] Q That is the only description or reason you had for stopping them?

A No, sir. The fact that they were both male Negroes and the approximate age of the suspects of this alleged offense.

Q What was the approximate age that you were relying on?

A Approximately thirty, I believe, at the time.

Q And that is the sole basis for stopping Mr. Cooper and his companion?

A No, sir.

Q What else was part of your basis?

A The fact they were walking towards the vicinity of the guard shack and the vehicle.

Q Anything else?

A No, sir, nothing that I know of at the present time.

Q Was this car parked in a parking area of this plant?

A In my opinion, no, sir. The parking area was across the street where the vehicle was parked.

Q Were there other cars parked in the area where this car was parked, this Mercury?

A Excluding the radio cars, of course, I believe Mr. Cooper's vehicle and possibly one other vehicle may have been parked directly behind Mr. Cooper's vehicle.

[fol. 257] Q And when you first saw Mr. Cooper, you say he was coming from the plant area by the guard shack?

A No, he was coming from the vicinity of the parking lot, which was across the street from the guard shack, and was walking easterly towards the guard shack in the vicinity of his vehicle.

Q In other words, if he were to continue to walk in the line he was going, he would have had to go by the guard shack?

A Yes, sir.

Q How far, about, was he from the guard shack when you stopped him?

A Approximately twenty feet, twenty-five feet.

Q How far was the car parked from the guard shack at that time?

A I would say between ten and twenty feet.

[fol. 258] Q I believe you stated that you asked him first, that is, Mr. Cooper, what his name was; right?

A Yes.

Q And he told you his name, Gilbert Cooper?

A Yes, sir.

Q Then you asked him something about the automobile, the Mercury?

A Yes, sir.

Q What was said?

A It was, in substance, if he owned the vehicle and if he had been driving the vehicle that day, or if any other persons had been driving the vehicle that day.

Q You already at that time had determined that it was registered to a white person, is that correct?

A A Caucasian person living in the County of Riverside.

Q After he told you—or, strike that.

You asked him if it was his vehicle. What did he reply?

A I beg your pardon?

Q What did he reply to that question?

A What was your question, Counsellor?

Q You asked him if he owned or belonged to the Mercury; something to that effect?

A Yes, sir, that's correct.

Q What was his answer?

[fol. 259] A That if he did own it or that it was his vehicle. But the answer was in the affirmative, that he did own the vehicle.

Q All right. What was next said or done at that time?

A He was asked if either he had loaned the vehicle to anycne that day or he had been driving the vehicle the entire day.

He stated that he had either driven the vehicle the entire day or had not loaned the vehicle to any person the entire day, I don't recall which it was.

Q Now, had you advised him of his constitutional rights up to that time?

A I beg your pardon?

Q Had you advised him of his constitutional rights up to that time?

A No, sir, I did not.

Q Was there further conversation before you advised him of his rights, if you did?

A Yes, sir, there was further conversation.

Q What was the additional conversation?

A Mr. Cooper informed us that he knew why we were there. And I asked him, well, what was that.

And he said that was about the shooting, or the incident either at the liquor store or at the store earlier that afternoon.

[fol. 260] I informed him yes, that was correct.

He stated that he had the gun that he had taken from the lady, or the gun that came from the store.

Q Now, after the defendant said to you that he knew why you were at the location, you then asked him why, or words to that effect; right?

A Yes, sir, that's correct.

Q You did not then advise him of his constitutional rights, did you?

A No, sir.

MR. MOORE: I have nothing further.

THE COURT: We will recess until 1:45.

(Whereupon the noon adjournment was taken at 11:57 o'clock a.m. until 1:45 o'clock p.m. of the same day.)

[fol. 261] LOS ANGELES, CALIFORNIA,
TUESDAY, JUNE 22, 1965 1:48 P.M.

(The following proceedings were had without the presence of the jury:)

THE COURT: The record may indicate that we are still outside the presence of the jury.

Do you still have an objection, Mr. Moore?

MR. MOORE: Well, your Honor, I have asked the officer all the questions I asked him, and I am now just making my objection to the statements that are about to come in.

THE COURT: The statements that have been uttered up to this time or the statements that are going to follow?

MR. MOORE: All statements that are going to come in in front of the jury.

THE COURT: The objection is overruled.

Bring the jury in, please.

MR. WARNBERG: Would your Honor—I have a witness—would you order—exclude all witnesses? I'm sorry. This gentleman is going to be a witness. He should be excluded.

THE COURT: He should be. What is his name for the record?

WITNESS VAUGHN: Loniero.

THE COURT: Sir, you are to wait outside until you are called. Once having testified, you will not discuss your [fol. 262] testimony with any other witness.

MR. WARNBERG: I might state, for the record, he just got here, your Honor.

(The following proceedings were had in open court in the presence of the jury:)

THE COURT: Sergeant Vaughn.

CHARLES WILLIAM VAUGHN,

called as a witness by and on behalf of the People, having been previously duly sworn, resumed the stand and testified further as follows:

THE CLERK: You are still under oath. Will you please state your name for the record.

THE WITNESS: Charles William Vaughn, V-a-u-g-h-n.

DIRECT EXAMINATION (Continued)

BY MR. WARNBERG:

Q All right, Mr. Vaughn, I believe we left you where I asked you as to the conversation—do you recall the question that was last given you?

A No, sir, I don't.

Q Well, we started to ask you as to the conversation you had with the Defendant Cooper?

A Yes, sir.

[fol. 263] Q You believe you were standing right there beside the automobile?

A No, sir; we were approximately twenty to thirty feet from the vehicle at the time.

Q And I believe I asked you whether or not you questioned him about the car.

A Yes, sir, I did.

Q And what did he say?

A In substance, that he did own the vehicle that was parked adjacent to the guard shack.

Q All right. Now, go ahead, did you talk with him some more at that time?

A Yes, sir, I did.

Q All right, go ahead.

Q Mr. Cooper stated that, in substance, that he had been driving the vehicle all day or a portion of the day and that on other person had been driving the vehicle and that he knew why we were there to converse with him.

He was asked what that was and he stated it was about the deal at the market—I don't recall if he stated it was down Holmes Avenue or down near Florence Avenue, but he stated that he had the gun that he had taken from the lady.

At that time I informed Mr. Cooper that he was under arrest for murder and that he was not required to give us a statement at that time, any statement he did give

[fol. 264] us would probably be used in court against him and he had a right to call his lawyer and remain silent throughout the entire proceedings.

Q You were right there at the scene when you told him about his rights?

A Yes, sir, at the place of arrest.

Q Who else was there at the time, if anyone?

A Sergeant Harold White, also Sheriff's Homicide; Sergeant Gerald Rowley, R-o-w-l-e-y, and I believe another colored gentleman was there at the time. I don't recall his name at this time.

Q And you were still at the Gaffers & Satlers location?

A Yes, sir, that is correct.

Q On the sidewalk?

A It was in the street portion adjacent to the Gaffers & Satlers.

Q Now, is that substantially all the conversation you had at that time with the defendant Cooper?

A No, sir; he stated that he would take us and show us where the gun was hidden inside the plant there where we were standing at that time.

MR. GORDON: May we have an objection—or, may I have an objection on behalf of Rhone, that all of this statement be deemed hearsay as to Rhone?

THE COURT: It is to be received, actually, ladies and [fol. 265] gentlemen, this statement or conversation may be received only as against the defendant Cooper and not against the other defendants. You are to consider it only for that purpose.

MR. WARNBERG: Q I was going to ask you, what gun are you talking about? Did you question him about a gun or how did that conversation come about?

A Previously Mr. Cooper had informed us that he had the gun that he had taken away from the lady. I recall he said the store or the market. This gun was there in the plant at Gaffers & Satlers and he had taken the ammunition from it and thrown it out at a laundromat construction site, I believe, near Hooper and Century or Hooper and Colton Avenue, which would be west of Cen-

tral Avenue; and then hidden again there in Gaffers & Satlers plant.

Q. All right. Now, first—was that substantially all the conversation right at that location?

A Yes, sir, it was.

Q Now, what did you do?

A Mr. Cooper directed myself, Sergeant White and Rowley and the Pinkerton security officer to the shipping and receiving department, the northeast gate or door, to a stack of wooden pallets and stated that it was hidden behind one of the pallets. Sergeant White then reached behind the second pallet from the bottom and removed a two-inch Smith & Wesson .38 caliber revolver.

[fol. 266] Q Let me show you—I should have the exhibits here—all right, officer, let me show you People's No. 6, and is that the gun that you found at that time?

A Yes, sir, it is.

[fol. 267] Q All right. Then what did you do?

A We returned to the guard shack portion of Gaffers & Satler's plant where we requested another unit to impound Mr. Cooper's '55 or '56 Mercury, the one that is depicted in People's 14 and 10, I believe.

Q All right.

A The vehicle was subsequently impounded, and we transported Mr. Cooper to Firestone Sheriff's station, where we had an additional conversation with him.

Q All right. Who was present at that time?

A Mr. Cooper, Sergeant White, Rowley, and myself.

Q You are now at the Sheriff's Substation?

A Yes, sir.

Q All right. Now, let me ask you this. Did Defendant Cooper at all times speak freely and voluntarily?

A Yes, sir, he did.

Q Now, what did you say when you got to the station? What was your conversation with Defendant Cooper?

A We asked Mr. Cooper if he would care to make a statement.

In substance, he said yes, that he would.

We ordered a statement reporter and a statement was subsequently taken.

Q In other words, then, at that time you had a stenographic reporter present?

A Yes, sir.

[fol. 268] Q And this stenographic reporter was right in the room with you?

A When the statement was made, yes, sir, or taken, yes, sir.

Q And as the conversation went on, did the stenographic reporter take down the statement?

A Yes, sir.

Q Have you since seen that statement?

A Yes, sir, I have.

Q Let me show you a document I have here. It is headed "Statement of Gilbert Cooper." It consists of some 31 pages, I believe.

And I will ask you if that represents the statement that was taken at that time of the Defendant Cooper?

A Yes, sir, it is.

THE COURT: Excuse me, Mr. Warnberg. For the record, each defense counsel, I assume, has been shown and has a copy of this statement?

MR. WARNBERG: Yes, your Honor. I do wish to represent that. As a matter of fact, each counsel has a copy of each statement.

THE COURT: All right.

Q BY MR. WARNBERG: All right. Now, Mr. Vaughn, is it necessary to give the statement verbatim for you to read it?

[fol. 269] A Yes, sir, it will be.

Q All right. Now, will you do that, and as you go through the statement indicate—First, this is Defendant Cooper only?

A Yes, sir, that is correct.

Q All right. Now, you go ahead and read the statement.

THE COURT: Excuse me. Approach the bench for just one moment, please, with the reporter.

(The following proceedings were had at the bench.)

THE COURT: Mr. Warnberg, I assume that you have already told the witness of my instructions, that he is to delete any reference to the other defendants?

MR. WARNBERG: Yes, your Honor.

THE COURT: Either what they said or what they—any reference to them whatsoever?

MR. WARNBERG: Yes, your Honor. And this is the reason I'm hesitating just a little bit. I want a little advice.

I have indicated to the officer that he is not to name another person where it is so indicated in the statement, but where the officer doesn't know what to do—he has stated to me that he will actually be changing the statement then.

And I indicated to him that that may be true as far [fol. 270] as naming other people. But where there is another person named, how does he indicate then that there was someone else? Does he indicate it by just a person or an individual instead of naming that person?

I might state that the statement has in many places naming the co-defendants, and that is what we do not wish to do, as I understand it.

THE COURT: That's correct.

MR. WARNBERG: Now, where the answers—

THE COURT: Let me see the statement.

MR. WARNBERG: —or the statement indicates the co-defendant, we are at just a little bit of a loss to know what to substitute in that place.

MR. WALTON: He refers to colored boys, white boys, things like that.

MR. WARNBERG: Yes, he does.

MR. WALTON: Cooper does, particularly. He doesn't name anybody.

MR. ROSEN: Yes. And he talks about a short guy and a tall guy, which is descriptive even without using the names.

THE COURT: Well, of course, I don't think that that is objectionable, I really don't. I think that is cutting it too fine, because there's an awful lot of tall guys and short guys. And if you just limit it completely, it absolutely doesn't have any meaning.

[fol. 271] MR. WALTON: In addition to which, your Honor, this is a 31-page statement, that is true, and it

will take a good portion of our time to read it. Most of this is exculpatory, this particular statement.

Except for certain admissions about a gun and a car, I feel that that statement by and large is exonerative and perhaps is challengeable. On that ground, not constituting an admission.

MR. WARNBERG: Well, except this, there is another statement that follows this statement which would show inconsistent statements.

THE COURT: Well, the only thing I want to make sure of is that he understands correctly what we are trying to do.

Is it necessary, do you think, for me to go over this and delete the portion which is not supposed to be read?

MR. WARNBERG: It would be helpful, your Honor. I think only in a few places in this statement does it name someone else. There are a few places. Other than that, the statement is good.

THE COURT: Well, I take it that he would spend the rest of the afternoon with the statements of all three defendants, is that right?

MR. WARNBERG: I would say so.

MR. ROSEN: Yes.

[fol. 272] THE COURT: If it is advisable to go through these statements, how long do you think it will take to delete? It shouldn't take more than an hour, should it?

MR. ROSEN: No, I don't think so.

THE COURT: Well, perhaps it might be better and wiser—

MR. WALTON: Wait a minute, wait a minute. I would say it might take more than an hour.

THE COURT: Well, I'm not going to excuse the jury for the rest of the afternoon. I don't want to lose all that time. If it takes longer, it takes longer.

But I'm going to excuse them now and we will take a recess and have the officer stay here, Mr. Warnberg, and we will go over the statement, and I want a reporter in chambers when we go over it.

And I will take all three statements and then we will be ready to proceed.

MR. WARNBERG: Thank you. And then would it be helpful to have the officer present, also?

THE COURT: Yes, that is what I said, I want him present.

MR. WARNBERG: Thank you.

(The following proceedings were had in open court in the presence of the jury:)

THE COURT: Ladies and gentlemen, we will take a recess at this time. It may be rather lengthy, I don't know. But don't be impatient. And stay, please, in the [fol. 273] jury assembly room.

(The following proceedings were had in the Court's chambers, outside the presence and hearing of the jury:)

THE COURT: On the record.

The record may indicate we are in chambers with counsel to go over these various statements to try and delete references to the other named defendants.

What is the first page that any of the defendants are named?

MR. GORDON: On page 18, your Honor, I believe it is line 17.

MR. WALTON: May I ask a question, your Honor?

THE COURT: Yes.

MR. WALTON: When you say "a name," do you mean "referred to"?

THE COURT: I mean refer to by name, actually names given.

Now, where he actually, on page 18—this is a direction to you, Sergeant Vaughn, and that is why you are in here, sir. I know this becomes a little difficult, but if we instruct you beforehand I think it will make it easier when you read the statement, sir.

On page 18?

Line 18, the question—no, starting with line—it will be 18, the question: "All right, how about Jesse?" Strike that, and the answer, "Jesse goes around," yes, we will strike that.

[fol. 274] Strike 19, because it is still referring to talking about Jesse, "What is his last name?" And then it goes into, "What's he look like?"

I think we ought to strike that because it is all about the same boy friend and it is descriptive of Bosby, which is in that sense—it is a long description and "short, pop eyes" and "big eyes," and looking at Bosby now, that is the only one you can think of; and, knowing that, I think we will delete that, too, so we will delete 20, 21, 22, 23, 24, 25, 26 and all the rest of that page.

Then on page 19, delete the first six lines—

MR. ROSEN: I would suggest, your Honor, the first 15 lines.

THE COURT: I hadn't got to that. It said, "Charlie, do you have any questions you want to ask him?" and that is where I stopped, but I agree with you now, it all, then, refers to Bosby, so delete the first 15 lines on page 19, Sergeant.

All right, now, when is the next reference, gentlemen, without having me read this, each line?

I am charging you with the responsibility of pointing these things out to me.

MR. WALTON: No other reference to a defendant by name, but there are references that I think are sufficiently damaging to defendants on this trial that I feel they should go out.

[fol. 275] THE COURT: All right, what are they?

MR. WALTON: I would say page 21, lines 9 on, discussion about a gun or about various guns that two colored men and a white man had. This doesn't incriminate Harrington in any respect.

And, further, the first 6 lines on page 22.

THE COURT: Well, since on 21 it doesn't describe anyone in particular, I am not going to exclude it.

Page 22, did you say, Mr. Walton?

MR. WALTON: Well, it is a continuation of the first 6 lines. My objection to this is that it is very inflammatory and has an incriminating impact, yet it is exonerative of the defendant who supposedly made the statement.

Now, this is hearsay and it is not necessary to any incriminatory statement that tends in any way to constitute

an admission against the maker of the statement. I feel that is what is wrong with substantially all of that statement, that it has no function in that it does not incriminate Cooper.

THE COURT: According to Mr. Warnberg, he says that it in inconsistent with a later statement he made and it is being introduced for that purpose; so, until I hear the other statement, I, of course, am going to have to take his word for it and admit this subject to a motion to strike.

Now, Mr. Rosen, this reference on page—starting at line 25 and 26 on page 21 and going up to page 22, I [fol. 276] assume this mostly refers to your client.

Do you have an objection to this?

MR. ROSEN: Yes, your Honor.

MR. WALTON: Well, your Honor—

THE COURT: Let Mr. Rosen answer, please, Mr. Walton.

MR. ROSEN: Well, of course, he talks about—he doesn't name the person who was using the gun in the store.

THE COURT: It could have referred to any one of them, if they were all holding guns.

MR. ROSEN: That is true.

THE COURT: I am going to leave it in.

MR. WALTON: Now, your Honor, before you abandon that, all that that does is incriminate everybody else but Cooper. It is hearsay.

Now, if this is coming in under the guise that it shows inconsistent with statements subsequently made, I would say this: there is no statement subsequently made by Cooper which is transcribed. Now, this is in great detail, this statement we have here; it is 31 typewritten pages, single-spaced.

All I know about the other statement is what I have seen in the reports and in the preliminary transcript, much shorter. Sergeant Vaughn testified to the essence of it at the preliminary hearing and his testimony on the point can't take more than two minutes, so wherein is it inconsistent?

[fol. 277] If Mr. Warnberg can make an offer of proof showing which portions of this statement are inconsistent

with the later statement, then possibly the objection which I have made is not well-grounded; but I feel that we are getting a lot of inadmissible testimony in here.

THE COURT: I disagree with you, because when he represents what happened in the place, everything that happened in the place is admissible against him, because as far as I am concerned, on the theory of felony murder, it is a conspiracy to commit a robbery; everything that took place in there as to one person is admissible as against the other person.

MR. WALTON: Nothing in this statement that your Honor is now examining would suggest a conspiracy of these defendants.

THE COURT: Well, you have to take the cumulative testimony. You have to take everything we have heard thus far. You can't just take the statement itself and say whether or not there was a conspiracy. Obviously there was a conspiracy to commit a robbery, four people involved, and everything that took place in that store is admissible against all of them. Anything that anyone did is admissible against all.

So, therefore, I don't think you are correct, sir.

All right, I'm going to admit it.

Is there anything else with reference to any of the [fol. 278] other named defendants in this particular statement, gentlemen?

MR. WALTON: Page 25, lines 12 and 13. Again, nobody is named, except it incriminates other defendants.

THE COURT: That is denied. I will leave it in.

MR. WALTON: Same page, lines 20 through 22, the one question and answer reflected on lines 20 through 22 and a half, for the same reason; it incriminates somebody else and not Cooper.

THE COURT: Denied. I will leave it in.

MR. WALTON: Page 30, lines 2 through 6, lines 12 through 15 and a half.

THE COURT: Mr. Warnberg, is there anything—does he say anything contrary to that later in that other statement?

These are the questions:

"Q Now I want to ask you this but I want to ask you, and I'd like to have a straight answer, did you and three other persons, two colored and one Caucasian conspire today to rob the liquor store at 6126 Holmes Avenue?

"A No.

"Q Did you or did you not?

"A No, I wasn't in there. There was an attempted robbery. I don't know whether they got anything or not, I don't know."

MR. WARNBERG: Yes, your Honor, we have a con-
[fol. 279] trary statement. A later statement was that they all got together and agreed to pull the job.

THE COURT: Is that correct?

WITNESS VAUGHN: Yes, sir.

THE COURT: All right, I will leave it in.

Let's go to the next statement. Let's go to Rhone's statement.

MR. MOORE: Before that, I will object to the statement, as long as we are in here on the record, I will object to the statement as no corpus delicti having been proved, based on the felony-murder doctrine, which is, I believe, the basis of the People's case.

I know you talked informally earlier today, but I am raising the objection that I don't believe that the People, relying upon the felony-murder doctrine in this case, have proven the corpus of attempted robbery.

MR. ROSEN: I will join in that.

MR. MOORE: I will object to this statement. And I also will add that, if I may, to the previous conversations the officer has already testified to, where I objected on the broader ground of constitutional—

THE COURT: The objection is overruled.

MR. ROSEN: I would like to join in that objection.

THE COURT: Yes.

MR. WALTON: I will join. And so the record is absolutely clear, the basis of my objection to the entirety of
[fol. 280] the statement, entirely apart from the specific instances which have been pointed out to your Honor, is

that this statement does not have the effect of incriminating Cooper, but it does have the effect of incriminating everybody else.

MR. GORDON: May the record show a running objection for everyone, then, as to the matter of the corpus delicti not having been established?

THE COURT: The record may so indicate. The objections are overruled.

MR. GORDON: Thank you, sir.

THE COURT: On Rhone's statement, now let's go to that.

MR. WALTON: Page 1.

MR. GORDON: It starts right out, your Honor.

MR. WALTON: Lines 21 through 26.

THE COURT: Those will go out.

MR. WALTON: Page 2, lines 1 and 2.

MR. WARNBERG: Not so fast.

THE COURT: There is no James Larson. Or is one of these other defendants known as James Larson?

MR. WALTON: No, it refers to him. "I know him by James Larson," meaning Harrington, the name of James Larson.

THE COURT: Oh, I see. 1 and 2 may go out.

All the rest of it refers to Jesse and then Cooper.

MR. MOORE: Line 8 would be out?

THE COURT: Yes, 1 through 8 on page 2 will be deleted

[fol. 281] 18 and 19 will go out, 20. Well, the rest of the page on page 2 will go out.

MR. ROSEN: From 18 through 26, your Honor?

THE COURT: Yes.

MR. WALTON: Well, then, your Honor, might I ask you to examine your question and answer roughly at lines 9 through 12?

MR. GORDON: What page?

MR. WALTON: On that same page, page 2.

THE COURT: Yes, that will have to go out, because it refers to the ones he is discussing, and it will leave an inference in the minds of the jury. So it will have to go out.

MR. WALTON: So all of page 2 is out?

THE COURT: That's correct.

MR. WALTON: 9 and 10 on page 3.

MR. ROSEN: Just a moment, how about—

THE COURT: Everything down through—lines 1 through 9 on page 3 so far has to go out.

Well, lines 11 through 16 may remain.

17—

MR. MOORE: Just a minute. 11 through 16, I will object to that, as they are talking now about trying to cash the check, and the only defendant would be Cooper, and that the conspiracy, if there be a conspiracy, is over. That is not admissible against him at that stage.

[fol. 282] WITNESS VAUGHN: Excuse me, your Honor.

Will you explain to me why all this is being eliminated? I'm somewhat in the dark on this legal angle on this.

THE COURT: Well, I think Mr. Warnberg will have to explain it to you, sir, because I don't have time now to explain it to you. I would like to be able to do it, but I just don't have time to do it now.

WITNESS VAUGHN: Thank you.

THE COURT: I'm not brushing you off, sir, really I'm not, but I don't want to go into that now.

Mr. Warnberg will explain it to you. If he doesn't do it satisfactorily, I will do it at a recess for you some time when the case is over.

WITNESS VAUGHN: Thank you.

MR. GORDON: Did you make a ruling, your Honor?

THE COURT: No, I haven't. I was rereading it, Mr. Gordon.

I'm going to leave it in, gentlemen. So you will understand, we are deleting lines 1 through 10 on page 3.

You may read 11 through 16.

Delete 17 through 19 and read the rest on page 3.

I want the record clear that merely by leaving this in doesn't mean it is admissible as to other defendants.

You gentlemen are objecting that there is still no con-

[fol. 283] spiracy and the evidence is inadmissible as to the other defendants, and I'm not saying it is, and I'm going to admonish the jury that the statement is admissible only as against the defendant uttering it.

So the record is perfectly clear on that subject, I'm not ruling that it is admissible, everything in the statement, is admissible as to all defendants. I haven't so ruled and I don't intend to so rule, and I intend to limit the statement as to the defendant uttering it.

But the purpose of this is to delete the names, with reference to names, so that the admonishment won't be an idle one. That is the purpose of it.

[fol. 284] MR. MOORE: In other words, this is in lieu of the severance, where we were trying to say the jury would hear evidence which might influence—

THE COURT: Well, you are telling me it is in lieu of severance, and I'm telling you it was only an additional concession I was giving to you, and I wasn't doing it in lieu of severance and that I thought severance was proper.

I don't want you to put words in my mouth, Mr. Moore, because I didn't tell you that severance was proper. I said severance was not proper, but that I wanted to try and be as fair as possible, and I was limiting these statements.

So please, sir, don't try and put words in my mouth. The record will adequately reflect—

MR. MOORE: No, I understand that. I'm certainly not trying to. I'm just trying to get it straight—

THE COURT: Well, I want it to be straight, too, sir.

MR. MOORE: Certainly. I thought the purpose here was to eliminate from statements matters that would unfairly prejudice the defendants by having the jury hear them, and therefore influence their decision, which they're going to be asked to make in the final verdict. That is my understanding of it.

THE COURT: Well, sir, I'm trying to be as fair as possible to the defendants in having stated it beforehand. I don't think I have to go through any of this trouble. I'm [fol. 285] trying to do it as fairly as I possibly can without taking the scissors and just cutting this up and repasting the words and making a new statement out of it. I cannot do that and I don't intend to.

So I'm trying to be as fair as I possibly can. I don't want you to attempt to cut me up and misquote me or mistake what you think I said.

MR. MOORE: Well, sir, I'm certainly not trying to do that. I can remember at the start of the trial when you said you were not going to grant this severance, you were asking each of us, in effect, "Will you take this offer," so to speak. I'm just trying to clarify in my mind. I'm not trying to put anything in your mouth.

THE COURT: All right. I hope it is now clear.

MR. MOORE: Thank you, sir.

THE COURT: All right. You gentlemen aren't helping me too much. I don't want to have to read every one of these. When is the next reference to a defendant in this statement, please?

MR. WALTON: I would say you have to go to 4. Incidentally, I'm only worried about my defendant, if you're trying to do it chronologically.

MR. GORDON: On Line 10, your Honor, that is, page 4, line 10.

MR. WALTON: Yes. Lines 10 through 18.

THE COURT: Well, I don't see—there is nothing [fol. 286] wrong with 12, with reference to "where I parked the car."

But there is nothing—no reason why that has to go out. Sergeant, on page 4, delete 10 and 11.

WITNESS VAUGHN: Maybe I better assist the counsel. At page 1 on George Rhone's statement—

THE COURT: Page 1?

MR. WARNBERG: We have already got—

THE COURT: We already struck lines 21 through 26, sir, on page 1.

WITNESS VAUGHN: Thank you.

MR. GORDON: Line 16 on page 4, your Honor.

THE COURT: Yes, that is the next one that has to go out, 16; question and answer will be stricken.

Lines 19—

MR. WALTON: I would ask—

THE COURT: Line 20—

MR. WALTON: I would ask that 4 and 5 go out, same page.

THE COURT: 4 and 5 will go out.

MR. WALTON: So 6 and 7 will have to go. It would be meaningless without 4 and 5.

THE COURT: It isn't meaningless at all, because lines 2 and 3 say, "We went down in two separate cars."

And the next question on line 6 is, "And what type of vehicle is that?"

[fol. 287] And the answer is, "It's a '52 Ford."

It's not meaningless at all.

The next is lines 19 and 20 on page 4.

[fol. 288] MR. WARNBERG: The next thing I notice is Page—

THE COURT: Lines 2 and 3 will go out and 4 and 5 and 6 and 7.

You may read the question there, it is just above line 8. You see, at 8 there is a question and answer; that stays in.

9 and 10 are out; 11 and 12 out, 13 out, 14, 15 out, 16, 17 out, 18, 19—the rest of 5 may stay in.

MR. ROSEN: Line 7 on page 6, your Honor.

THE COURT: Right, line 7 on page 6 may go out; also, 8 and 9, 13 and 14 are out, 16 out, the question and answer; 17, 18 out, 21 and 22 out, 23 out.

Page 7, line 5 out, 8 and 9 out, 10, 14 and 15, 17 and 18, 23 out, 24 out, 25, 26.

On page 8, line 3, the question is all right. The answer, "Well, she pulled the gun, I could see she was going to shoot," put a period at that and delete the rest of the sentence until you get down to where it says, "I grabbed her arm"; the rest of line 5 is out.

MR. WARNBERG: A period after "arm," your Honor —after "arm," period?

THE COURT: That's right, and the rest of the sentence is deleted.

Then we get down to line 14. Delete line 14 and line 15.

You will read, "When I grabbed the gun I held it down [fol. 289] so if I did fire it"—

MR. GORDON: "So that if it"—

THE COURT: "So that if it did fire it would fire on the ground," period; strike the rest of the sentence.

16 and 17 out, 18 out, 19 out, 21, 22 out, 23 out, 24 and 25 stay in, 26 deleted.

Go to page 9, line 2, strike "Sometime after Cooper took the gun from the lady," strike that, and we will leave

in, "Did you hear a shot ring out? Answer: Yes"; leave the rest in through line 6.

Strike line 7 and 8 and 9, 10, 11, 12, 13, 14, 15, 16, 17, 19.

At 19 you can commence again to read through the rest of the page, okay.

Go to page 10. The next question has got to go out because it mentions "Jesse facing" and "the old man," and we don't know what the answer refers to, "Jesse and the other man," so if we strike the question we will have to strike the answer, lines 1 and 2.

Strike through line 5, line 7 okay, except strike the words "Cooper and Harrington"; strike line 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26.

Page 11, still talking about the gun and he was referring to the one that Bosby had, so this conversation makes no sense unless we refer to Bosby so apparently that will [fol. 290] have to go out. Strike, then, on page 11 all the way down through line 14.

Start with line 15, and you can leave the rest of the page, page 11.

Page 12, strike 5 and 6 and 7 and 8 and 9, line 12; strike lines 25 and 26.

MR. GORDON: You mean page 12?

THE COURT: I mean page 12, pardon me.

MR. GORDON: Your Honor, you are striking from line 5, also, to about 15, aren't you? It is about "them hitting the cash register." Did you want that in?

THE COURT: No, that stays in. I struck from lines 5 through 9, that is all.

MR. GORDON: All right.

MR. WALTON: Well, I would object to that—

THE COURT: Overruled.

MR. WALTON: —because it tends to incriminate Harrington when he obviously isn't referring to Harrington.

THE COURT: Harrington is not even named here, as I can see.

MR. WALTON: Except the part you struck, your Honor, absolves him from any responsibility for hitting the cash register.

THE COURT: I am not going to analyze this statement, Mr. Walton.

MR. WALTON: I have to.

THE COURT: You made the objection and I overruled it. Let's go on with it.

[fol. 291] On page 13, starting with line 9, delete to line 15.

Page 14, strike lines 7, 11, 12 and 13.

MR. WALTON: Well, excuse me, your Honor. When you say line 7, do you mean the question and answer?

THE COURT: Yes, sir.

On lines 14 and 15 there is a reference:

". . . after all four of you got back in Cooper's car . . ."

Just change that and, ". . . after all four of you got back in the other car."

Strike "Cooper's." Change "Cooper's" to "other," Officer.

Line 21, it says, ". . . where was Glen's car parked . . ."

Change it to, ". . . where was the '52 Ford parked . . ."

On page 15, line 4, second line from it, says, ". . . got out of Cooper's car . . ."

Change it to ". . . the other car" again instead of "Cooper's."

Strike 6. It's too muddled to change.

And 7 and 8 and 9.

Line 13, just change that, where it says ". . . you jumped into the car belonging to Glen?"

Change it to ". . . you jumped into the '52 Ford."

[fol. 292] Strike 15.

Page 16, strike lines 1 and 2.

Strike line 11, question and answer; 13, question and answer; 14, question and answer; 15, question and answer; 16, 17, 18, 19, and 20—well, wait a minute.

Leave in, on page 16, the answer at line 16, "We didn't go any place in particular. We just rode for awhile, all over."

Then strike 18 and 19 and 20.

Then go on, starting with the question on line 21.

Strike 23.

On line 25, where the answer is "Glen's," just say "The '52 Ford."

Strike line 26.

Page 17, strike lines 1, 2, 3 and 4.

Page 17, line 3, strike the word "Glen," leave in the rest of that.

Strike 16, 17, 18, 19 and 20, 22, 23, all the way through 26 on 17.

Page 18, 1, 2, 3, 4, out; 5, lines 17, 18, 19.

Line 22 it says—strike 17 through 21. But, in order to make 22 understandable, because we are deleting those other five lines, at 22 change, "In other words, you took the gun," instead of ". . . you took it—" it really is the .22, isn't it?

MR. WALTON: That is correct.

[fol. 293] THE COURT: Let's change it to "gun." Say, "In other words, you took the .22" instead of "it."

Line 24, strike—

MR. ROSEN: Well, your Honor, that doesn't really make sense either, because he took the gun from Glen.

THE COURT: That's true.

MR. ROSEN: And the context would be wrong.

THE COURT: Well—

MR. ROSEN: You could say he took it from somebody else.

THE COURT: Yes.

MR. WALTON: Well, in that respect, the jury will be confused, because there is testimony that a gun was taken from the woman, that Rhone participated in the taking of it, and he at least held her hand.

THE COURT: Well, why don't we delete this line: "In other words, you took it when the scuffling started and you saw that girl go for the gun, is that right?

"A Yes.

"Q And what was your intention to do with that gun when you took it from one of the other fellows?

"A It was to scare her so she wouldn't shoot anybody, that's what."

Is that all right?

MR. GORDON: There was another gun-taking incident. This is the time he is taking the gun from this [fol. 294] storekeeper to keep her from shooting somebody. Will they confuse that with the other incident? You see, that might confuse them, your Honor.

You remember when Cooper took a gun from this same woman, they will think each is lying about the same situation.

MR. WALTON: Well, I would ask first that it all go out. But if your Honor intends to leave some of it in, I would suggest a period after the phrase "when you took it" at line 24.

MR. GORDON: I think that should all go out, your Honor.

THE COURT: I would rather have it all go out rather than to confuse them.

MR. ROSEN: I think so, your Honor.

THE COURT: All right, let's just strike lines 17 to 26 on page 18.

Page 19, lines 1 through 9 are out.

Well, also, I guess 10 through 17 is going to have to go out, because you cannot make that make any sense at all, because it refers to Glen's gun. It doesn't make any sense, you cannot change it, so we'll have to leave it out, I think.

Just a minute. It will all have to go out. It doesn't make sense if you try and change it; just leaving Glen's name out doesn't help.

[fol. 295] Well, delete the entire page 19.

On page 20, strike the first seven lines.

8 is okay.

And 9, I think, instead of that "As far as me and Glen is concerned," just "As far as I am concerned, it was the first time I ever seen it," and delete "Glen."

11 and 12, out.

13 and 14 refer to a conversation about Bosby, so that will have to go out.

Well, the rest, this business about this conversation that he had with Jesse certainly is admissible as to Rhone, and I think it should stay in, because it shows his complicity in the robbery.

The thing is that Jesse's name has to be deleted. So on line 11, don't read the question, "How about Jesse?" Strike that.

And then where it says "Did he say he'd been up to the market and looked it over?"

And the answer is "Yeah."

"Did one of the men say he had been up to the market and looked it over?

"A Yeah."

MR. WALTON: I would object to that, because it leaves the jury to speculate that this might have been Harrington who did that. That I think would be very damaging.

[fol. 296] THE COURT: It's sure difficult to be fair, isn't it?

MR. WALTON: It is very difficult when you have this many defendants.

THE COURT: We shouldn't have started it in the first place.

It is far from funny, it is sure far from funny.

Well, I am not going to eliminate the statement, gentlemen, because it is not fair to the People. I want to be consistent with eliminating the names, so I would respectfully ask your consideration in trying to help me out of this dilemma. There is such a thing as being fair to both sides, you know, and that is what I want to do. It is not fair to the People to eliminate a statement that is that incriminating.

MR. GORDON: Can't you say, "This particular man"?

THE COURT: That is what Mr. Walton is objecting to, because he will say the jury is speculating as to which one said it.

MR. GORDON: I don't think it would be too speculative, because the evidence thus far brought out that it will reveal, I believe, this is the first time that Rhone and them had ever been by there, anyway. Won't it come out eventually?

MR. WALTON: I don't plan to put Harrington on at this moment, so it is not going to come out through him.

MR. GORDON: Well, the statement of Cooper—it is [fol. 297] Cooper's statement.

THE COURT: Cooper is the only one, frankly, that would be hurt by this because he is the one that has cashed checks there before, as far as the evidence is concerned. He is the one that really should be objecting to this, as far as Harrington—

MR. MOORE: Like your Honor said, without trying to be facetious—

THE COURT: I am not trying to tell you to object, Mr. Moore.

MR. MOORE: I am saying, the dilemma that we find ourselves in—not criticizing, but to eliminate, I agree with you, hurts the People's case as to that defendant, that is true. I agree with that, but in letting it in, it is my point throughout, it is detrimental to one or more of the others. It is difficult, there is no question about it.

MR. ROSEN: This poses, this series of questions here on page 20, poses the most difficult that we have encountered so far in these statements.

THE COURT: That's right.

MR. GORDON: Your Honor, is there that much to be gained by eliminating it, wherein the event if our men don't go on the stand they are dead? If they take the stand, the People can use for cross examination, so what is to be gained by putting it in?

[fol. 298] We have got to put our clients on the stand, and once we expose them to the stand, the People have us wide open anyway.

THE COURT: Sure, all of this that I am deleting will all be brought back in, all of it will be brought right back in.

MR. GORDON: It will be brought in.

Let's ask Mr. Warnberg if he has any objection to striking page 20, from lines 11 through 19?

MR. WARNBERG: Let me ask this: on cross examination if I bring out the other names on cross examination are there going to be objections to that?

THE COURT: Their objections will be overruled. On cross examination there is no proper objection. On cross examination you can ask them if they made these statements they are now testifying.

The reason these are objectionable and admissible as against one defendant is because they are extrajudicial statements.

MR. ROSEN: I must just tell you, in all fairness, however, that I am going to put Bosby on the stand in the case in chief.

MR. GORDON: If we don't put the man on the stand, we are dead anyway, because it would seem—

THE COURT: Well, that is true.

MR. GORDON: We are between the devil and the deep [fol. 299] blue sea.

MR. WARNBERG: That is where you put me.

THE COURT: No, this is Rhone's statement, at any rate. If Rhone takes the stand you can ask Rhone this question on cross examination.

MR. WARNBERG: Well, he indicates, your Honor, that he was there with "Jesse."

Now, I would have to ask him if it is true that he told this officer that he had been to the market with Jesse.

MR. ROSEN: That's right, you can do that on cross examination.

THE COURT: On cross examination you can do it.

MR. ROSEN: You can ask him, can use any name that is proper.

MR. GORDON: You grant our point?

MR. WARNBERG: Well—

MR. ROSEN: Of course, you are not limited on cross examination to using the other man.

MR. WARNBERG: I will agree to that, except I don't know now—you stated you don't know whether he is going to put them on or not.

MR. GORDON: You ought to be glad we don't, because we are dead. The only thing we could do is expose ourselves to more—

MR. WARNBERG: I think, your Honor, that the first [fol. 300] suggestion made here was strike "How about Jesse?" The rest of the sentence, it merely states that he said he had been up to the market and looked it over—"A Yeah"; he doesn't indicate anyone else there at all.

MR. GORDON: But you want to protect your record here and protect the Judge, after all. You don't want that in so we will have some ground to raise—

MR. ROSEN: That's right, because it leaves the inference that it might have been any one of the other three who cased the market.

MR. WARNBERG: That question?

MR. ROSEN: Yes, that question.

MR. WARNBERG: In other words, the question is—

THE COURT: The point is, it is still only admissible as against Rhone. Even if we said, "How about Jesse?" it is still only against Rhone; is that right?

MR. ROSEN: That's right.

THE COURT: In order to be consistent, that is what I have to do.

MR. ROSEN: That's right, so the only real answer to it would be if Mr. Warnberg would agree to just strike the lines 11 through line 18, because I don't think he is jeopardizing his entire picture by that deletion, but it does answer the dilemma that we are now found with.

[fol. 301] MR. GORDON: This statement of Rhone's certainly doesn't exonerate Rhone in any way. The rest of it is enough.

What do you say, Warn?

MR. WARNBERG: All right.

MR. ROSEN: "All right," he says.

MR. WALTON: So, then, we are talking about the rest of the page, really.

THE COURT: We would have to strike all the way through line 24, then.

MR. ROSEN: Yes, I would agree.

THE COURT: All right, all the way through line 24, strike, okay?

MR. GORDON: 21 should be stricken, too.

THE COURT: I want the record to note that you are laughing when you said that, Mr. Gordon.

MR. GORDON: Yes, your Honor, that was because it was to put the finishing statements on.

THE COURT: I think we can dispose of the statement of Harrington very quickly, because there was nothing said, correct, Mr. Walton?

MR. WALTON: Yes, your Honor, I noted on this that point that the uniformed officer who was specifically ex-

cluded this afternoon apparently deals only with Harrington.

Is that correct?

MR. WARNBERG: The officer that is out there now [fol. 302] has statements of Harrington at the time of his arrest, that is correct.

Now, towards the latter part of the statement, your Honor, I believe—I thought there was some mention—

MR. WALTON: Not in this statement.

THE COURT: I don't think you should go into—I don't know if you are going to go into the statement at all—on page 3 the question, line 16: "Sergeant White, do you have any questions you would like to ask?

"Yes, I have. Are you the same Glen Martin Harrington that escaped from road camp No. 11 in Humboldt County on October 10, 1964?"

MR. WARNBERG: No, your Honor.

MR. WALTON: I would object to this entire statement, in that it doesn't tend to incriminate.

THE COURT: I don't know what he was going to ask him on this or if he was going to go into it at all.

All right, Bosby's statement.

MR. WALTON: Well, your Honor, now, in the interests of conserving time, might we not reconvene and spend, so the jury's time is not wasted, and perhaps meet on Bosby's statement fifteen or twenty minutes earlier in the morning and start at 10:00 o'clock starting time?

THE COURT: We are going to take a 10:00 o'clock starting time, anyhow. It is P & S tomorrow.

I will tell you what, Mr. Rosen, since you are involved [fol. 303] in this—

MR. ROSEN: Yes, I will go over the statement.

THE COURT: I would like you to go over it very carefully.

MR. ROSEN: And make notations.

THE COURT: And make notations with respect to it, sir. Be ready to advise the Court tomorrow morning what you think should be deleted.

MR. ROSEN: All right.

THE COURT: I know that you will be meticulous and have in mind what the Court is trying to accomplish here.

I have implicit faith in your integrity and your ability to do this fairly, so I am going to be relying upon you to a great extent.

MR. WALTON: All right, now, is he to protect Harrington as he goes through it?

THE COURT: I am not asking him to protect anybody. I am asking him to tell me what portions he thinks should be deleted in accordance with what we are doing here today.

I am not saying that what he is going to do is going to be binding upon anybody. You each have responsibilities and you each carry out your own responsibilities.

What I am asking him to do is for the benefit of his client, primarily, but also for the benefit of the Court to save the Court some time.

All right, five minutes.

(Recess.)

[fol. 304] (The following proceedings were had in open court, within the presence of the jury:)

THE COURT: You may continue, Mr. Warnberg.

MR. WARNBERG: Thank you.

DIRECT EXAMINATION (Continued)

BY MR. WARNBERG:

Q Now, Mr. Vaughn, I believe—

THE CLERK: You are still under oath. Will you state your name for the record, please.

THE WITNESS: Charles William Vaughn.

Q BY MR. WARNBERG: Mr. Vaughn, I believe we were discussing, just before the recess, that you were about to read the statement of Defendant Cooper, is that right?

A Yes, sir, that is correct.

Q Do you have that statement in front of you?

A Yes, sir, I do.

Q And that statement fairly represents the conversation you had at that time with Defendant Cooper?

A Yes, sir, that is correct.

Q All right. Now go ahead and read the statement.
A (Reading:)

"Statement of: Gilbert Cooper taken at 12:30 a.m. on Saturday, December 12, 1964, at the Los Angeles County Sheriff's Firestone station, located at 7901 South Compton Avenue, Los Angeles, California, in
[fol. 305] the presence of Sergeant H. W. White and Sergeant C. W. Vaughn of the Homicide Detail, Los Angeles County Sheriff's Department Detective Bureau.

"This statement obtained from above witness during investigation of the crime of Robbery-Murder, under File Number Y 083 460.

"Reported by: Harold St. Thomas, Stenographic Reporter, Los Angeles County Sheriff's Department Detective Bureau.

"BY: SGT. WHITE: Let me have your full name.

"A Gilbert Cooper.
"Q Your age?
"A 29.
"Q Your address?
"A 768 West Colden.
"Q Who do you live there with?
"A My wife and daughter.
"Q And where do you work?
"A Gaffers & Sattler.
"Q And the address there?
"A 4851 South Alameda.
"Q Before we go any further, Gilbert, I want to tell you that you do not have to tell us anything in any way, shape or form. You have a right to have an attorney represent you at all stages of this game.
[fol. 306] You have a right to remain silent. These are your constitutional rights. Do you understand those?
"A Yes.
"Q Are you aware of your constitutional rights?
"A Yes.
"Q You understand what I am talking about?
"A Yes.

"Q All right. Now, the questions I am asking you here are questions that we hope will bring pertinent information into the investigation of the robbery and homicide that occurred at 6126 Holmes Avenue in the Firestone District about 2:30 p.m. on December 11th, 1964.

Now, we'll ask you some questions. You can answer them any way you like or you can refuse to answer them.

Now, do you own an automobile?

"A Yes.

"Q What kind of automobile?

"A '56 Mercury.

[fol. 307] "Q What color is it?

"A Green over green.

"Q Light green over dark green?

"A Light green and dark green.

"Q Do you know the license numbers?

"A No, I don't really.

"Q If I read you the license number would you recognize it?

"A I don't know if I would.

"Q KCY842?

"A That sounds like it.

"Q And is your automobile the one that was towed away from the Gaffers & Sattler's plant earlier this evening?

"A Yes.

"Q Would you tell me what your activities were from 12:00 noon until we took you into custody earlier this evening?

"A 12:00 noon? I was around home for awhile. I left. When I got my check, it was about 10:30, I guess, when I went to pick my check up. I came back home. I ate. Then I worked on the car for awhile. I got a hole in the muffler and I tried to put a patch on that. It didn't do much good, but—and I went out to Dr. Morse's office.

"Q Is that William R. Morse?

[fol. 308] "A Yes, but he wasn't in his office. There wasn't nobody there. And I left there about—that's

when I went over across town to the liquor store. That's when I went in to cash my check, and this is what happened. I mean, I was just there when the guy shot this man.

"Q Let me ask you, what liquor store are you referring to? Where is it?

"A It is on Holmes. I don't know the exact address.

"Q About 62nd and Holmes?

"A It's in the early sixties, I'd say that.

"Q All right, had you ever been in that liquor store before?

"A I've cashed checks there before.

"Q Who cashed them for you before?

"A I think the old man.

"Q Which old man?

"A The one that got shot.

"Q What does he look like?

"A He looks something like an Italiana or something, I think, wore glasses, gray hair, kind of tall.

"Q You have cashed payroll checks there before from Gaffers & Sattler's?

"A Yes, I have, from Gaffers & Sattler's, [fol. 309] yes.

"Q When was the last time you cashed one there?

"A I can't remember exactly, but it would be within two or three months, because I've been off from work ever since the 13th of last month until Wednesday, because of the accident.

"Q You received some injuries in this accident?

"A Yes.

"Q Were you hospitalized?

"A Not hospitalized, but I was hit from behind; I had whiplash and a little back trouble.

"Q What is the general condition of your health now?

"A Well, my doctor had me on not exceeding 25 pounds for two weeks.

"Q What do you mean, 25 pounds?

"A Not lifting over 25 pounds.

"Q Did you work?

"A Yes.

"Q Since when?

"A Since last Wednesday. It was the 9th, I believe.

"Q How much was this check that you went in there to cash?

[fol. 310] "A Eighty-one something; eighty-one and change.

"Q Was there a—

"A And it had the sick pay on the bottom of the thing.

"Q Was there a stub attached to this?

"A Yes, there were; that's where it said sick pay, on the stub.

"Q And does the stub have a breakdown of your deductions, etc. and what not?

"A Right.

"Q And what color is this check?

"A Green and white.

"Q Where is the green and where is the white?

"A Well, it's got a Gaffers & Sattler's trademark and got something written inside of it. I think it's trimmed with green, I believe.

"Q White with a green emblem and trimmed in green?

"A It is a green emblem. No, it's not trimmed in green.

"Q What time do you think you got to this store?

"A It was around 2:00; maybe 2:15. I didn't pay no attention to time.

"Q Anybody with you?

[fol. 311] "A No, there wasn't. I went in the store alone.

"Q Who did you see in the store?

"A Well, I mean, when I went in there, this man, the young guy and this lady. I didn't see the old man. So I just went in. I went back out and got my check and I went back in and evidently he was around on the other side. And I got a little—

"Q When you first went in the store, who did you talk to?

"A The lady.

"Q What did you tell her?

"A I asked her could she cash a check for me.

"Q Were you going to make a purchase?

"A I was going to buy something, yes.

"Q What did she say?

"A She said, 'Let me see what kind of a check it is.' And I went to her and pulled my identification out and laid it on the bar, on the table, and I don't know. Anyway, she kind of glanced over and said, 'No, I don't think so; not today.' I said, 'This is a good check. I've cashed it here before.' She said, 'No, I don't think so; not today.' And that's when all the ruckus started in the back.

[fol. 312] "Q When you went out in the car, where was your car parked?

"A Up the street about two car lengths.

"Q Two car lengths north of the store?

"A Mm-hum.

"Q And it is this green '56 Mercury?

"A Right.

"Q License KCY842, light green over dark green?

"A Yes.

"Q Now, was there anybody around the front of the store when you walked in?

"A There was a guy in a telephone booth; I noticed that. There was a guy in the telephone booth when I went back in.

"Q Where was the telephone booth?

"A Right next door to the thing.

"Q A colored guy?

"A Yes, a colored guy.

"Q What did he look like?

"A Short, wearing a trench coat and had a mustache, a dark hat, dark blue or something like that.

"Q What kind of a brim?

"A It wasn't a narrow brim, you know, It was kind of a regular—

[fol. 313] "Q All right, did you see this guy at any time later?

"A What do you mean? After it was all over with?

"Q After you saw him in the telephone booth?

"A Yes, because he came in the store. He's the one that hit the man.

"Q Now, how many people did you see outside of the store?

"A I don't know. I know it was two old men getting out of a car, coming into the store when we was leaving. I saw two old mens. They acted like they couldn't hear or see nothing.

"Q White or Caucasions?

"A Caucasions; they was white.

"Q Did they go into the store?

"A I didn't look back, you know; don't know really.

"Q When you came into the store after going out to get your check, did anybody follow you into the store or go into the store prior to you going into the store?

"A I really wasn't noticing. When I went back with my check and asked her to cash it the second time, somebody, they came in right behind me this time, I'm pretty sure of that.

[fol. 314] "Q Who came in behind you?

"A I didn't notice, but I was standing there, trying to get my check cashed.

"Q How many came in behind you?

"A Well, all three of them was in there when I knew anything. Like I say, this other guy hit this other guy.

"Q When you came in with your check—

"A Mm-hmm.

"Q Were these three other people you are talking about in the store?

"A No, they came in after I did.

"Q After you did?

"A Yeah, I'm pretty sure of that.

"Q Where did you see them about the store?

"A I wasn't noticing, now. Like I said, I was standing to the counter, trying to get the lady to cash my check. And then I noticed this guy hit this old man, and I looked around and I looked back over"—excuse me.

"A I wasn't noticing, now. Like I said, I was standing to the counter, trying to get the lady to cash my check. And then I noticed this guy hit this old man and I looked around and I looked back and this white guy and a colored guy looked up. And he was standing right over there, you know. So he [fol. 315] ran around the bar, grabbed the wine bottle—

"Q Who ran behind the bar?

"A The old man.

"Q All right.

"A Got a wine bottle and he dropped it or broke it or something. Anyway, he was coming from behind the bar. He didn't have no glasses on. And they guy told him, 'Stop,' or something, and he didn't stop anyway, and the man shot him.

"Q Where was the old man standing when he was shot?

"A He was coming from behind the bar between the two, you know, like the gate. He was coming through the—out.

"Q Towards the front of the store or towards the back of the store?

"A Oh, to the side. I mean, like the store is, this is the entrance, right? And this is the cash register or whatever. And there's a gate here. So he was coming out, going right straight back across the wall.

"Q Let me go back here to a little diagram that I have drawn here. It's very rough, something that I drew. All right, here's Holmes Avenue. And this is north over here, this is east and this is south; [fol. 316] and this is the door, front door, going into the place right here.

"A Mm-hmm.

"Q And this is where the cash register is.

"A Mm-hmm.

"Q And this is the counter where the cash register is, right?

"A Mm-hmm.

"Q This is—here is the delicatessen here and back over along here, here's wine along the north wall and there is liquor along this wall, up towards the front, right?

"A Right.

"Q And there is a high shelf-like deal containing hair spray, shaving lotion and all that stuff standing right here near the front door of the store, kind of towards the west side. You remember that? Where there's shampoo and razor blades and hair spray and stuff?

"A Yeah.

"Q Where they keep sundries and whatnot?

"A Yeah.

"Q And there is a cold box right here?

"A Cold box?

"Q A glass deal where they keep milk and ice cream and stuff?

[fol. 317] "A I really didn't notice that that close.

"Q Over here along this wall there is groceries all stacked up in shelves, is that right? Canned goods and stuff?

"A Could be. I—I don't know.

"Q All right, there is another cold box here, down along the south side of the building, towards the east end, and back here there is a bunch of cookies and bread and stuff. Over here there is a beer case, right?

"A I know there is a beer case straight back.

[fol. 318] "Q And there is sort of a little wall that comes out from the back here, back in here there is a sink and what not. That's the sink in the northeast corner. Now, where were you standing when you saw the old man hit over the head with a gun?

"A Well, like here.

"Q You were standing—

"A This is the first counter, right.

"Q Okay, right about there?

"A Yeah.

"Q All right. And where was the old man standing when he got shot?

"A The old man went around this way.

"Q He came in back?

"A Right.

"Q Down this way? All right.

"A And he grabbed a wine bottle back here, like I said. He grabbed a wine bottle and dropped it or broke it or something. Anyway, he was coming out.

"Q That's between this delicatessen deal and the cash register?

"A He was coming out through here. He made this corner like, you know, kind of turned like that, and the guy told him to stop and he didn't, and the

[fol. 319] "guy shot him.

"Q Shot him right here?

"A He was coming up right in here, around the corner of this. I think he almost grabbed this when he was falling.

"Q And he was standing near the end of the delicatessen, where you keep cheeses and meat?

"A I don't know what was in there, but I know this gate was in here and he was coming out this way.

"Q And what happened?

"A The guy shot him.

"Q Shot him while he was standing right here?

"A He was still walking, coming through like this, and the guy told him to stop. Anyway, the man looked like he turned toward him or something. Anyway, he shot him straight on. I saw the blood when he fell.

"Q Where did he finally fall?

"A Kind of over here. Kind of behind, over the counter, and this guy and the other lady went toward him. And that's when everybody scattered.

"Q What do you mean, they scattered?

"A I mean they ran out after he shot the man.

[fol. 320] "Q Did you hear them say anything?

"A 'Get out of here.'

"Q Did you say anything?

"A I just sat there looking.

"Q Now, when this man was coming around here with a wine bottle in his hand and the man came over here with it—the man was standing with his back to the door?

"A Yeah, to the door.

"Q To the front door?

"A Right. And the old man was coming out. Anyway, he was coming out from around this counter. Now, this is the front, right?

"Q Right.

"A While I was standing here, this guy standing over behind me, like over here.

"Q Who was standing behind you?

"A This tall guy.

"Q Tall colored guy?

"A Yeah. So the man was coming out and the guy told him to stop. I don't know who shot him because, I mean, I saw two guns. I don't know whether the tall guy shot him, to tell the truth. Anyway, I heard something shot and I saw the blood and saw the man going down, and I said, 'Oh, boy.'

"Q Then what did you do?

[fol. 321] "A I ran out of there then. After the old man went down, I went out of there.

"Q When did you take the gun out of the lady's hand.

"A I think it's when—I don't know—when the man shot him or before he shot him, I don't know. Anyway, this guy behind the thing with the lady, he saw two guys had guns. I grabbed her arm, she ran back, and I took it and twisted it out of her hand, just like that. If he'd shot me, he'd have shot her."

MR. GORDON: That is incorrect.

THE COURT: Excuse me. I think you missed something. Do you want to read that again, the last sentence on page 8.

THE WITNESS: (Continuing reading:)

"If he'd shot one, he'd have shot her."

THE COURT: All right.

THE WITNESS: Thank you. (Continuing reading:)

"Q Let's say this table here is the counter and then this is the cash register here.

"A Okay.

"Q I'm the lady with the gun. Where did she get the gun?

"A I think out of the cash register.

"Q Out of the cash register?

"A I think so.

[fol. 322] "Q What hand did she have it in?

"A I really don't know.

"Q Where was she pointing it?

"A It must have been her left hand.

"Q Where was she pointing it?

"A Well, she was pulling it out. This other guy grabbed it and said, 'No, no,' something like that, and the gun went up, and I took it and I grabbed it out of her hand.

"Q Where was the gun when you first saw it?

"A In her hand.

"Q And where was her hand?

"A It was up in my face just about.

"Q In your face?

"A Almost.

"Q Stand up like you were standing. Now, I'm the lady. Where have I got the gun?

"A Well, like, you know, it's kind of like that, and I grabbed it and twisted it out of her hand.

"Q Was it her right hand or was it her left hand?

"A I don't know. I think it was left.

"Q In this hand here?

"A I think so. I was standing like that. Yeah, I'm pretty sure it was left.

[fol. 323] "Q All right. Did you touch the lady any other place, other than her arm?

"A No.

"BY SGT. WHITE: Sit down for just a moment.

"(Off the record at 12:45 a.m. The statement resumed at 12:50 a.m.)

"BY SGT. WHITE:

"Q Are you sure that you didn't put one hand to her throat?

"A Of course not. I'm positive of that.

"Q All right. Now you've got the old man shot, and he was shot out in front of the delicatessen case like you say here, shot out about in here some place?

"A Right. He was coming from behind the counter.

"Q And he was coming out this way with a wine bottle in his hand?

"A He had a wine bottle. I saw some wine wasting, but I don't think he had no wine bottle coming out through the gate. I didn't see, you know. I was kind of watching them guys with those guns.

"Q After he was shot, what did he do?

"A He went down, you know.

"Q Where did he fall?

[fol. 324] "A Right where he was shot. Well, he was moving, you know, trying to make a step, but he was going down slow.

"And they picked him up and moved him back into the back, I believe. They picked him up and carried him back in the back. I'm not sure.

"Q Back in the back of where?

"A I don't know. I didn't stick around to find out.

"Q Who was the first out of the door?

"A I don't know.

"Q Were you?

"A No, I was the last one out.

"Q All three of these other guys went out first?

"A Yeah.

"Q When you got out on the sidewalk, what happened?

"A I told you, I raced into my car.

"Q How did you get into your car?

"A Got in through the driver's side. Two was up and one was behind. When I got to the car they jumped into my car.

"Q They were already in your car?
"A No, no.
[fol. 325] "Q How did you get into your car? Did you walk around the front or the back?
"A The back.
"Q And got in the driver's seat?
"A Right.
"Q And when you got in the driver's seat, was anybody else in the car?
"A They was jumping in it at the same time.
"Q Who sat in front with you?
"A I think it was the white boy, I believe.
"Q What did he say to you?
"A He says, 'Get out of here, let's get out of here,' you know."

THE COURT: Excuse me. I think you misspoke yourself again, sir. Do you want to read line 4, the answer again, sir.

THE WITNESS: (Continuing reading:)

"A He says, 'Get it out of here, let's get out of here,' you know."

THE COURT: Go ahead, sir. Fine.

THE WITNESS: (Continuing reading:)

"Q Did he have anything in his hand?
"A No, he didn't have nothing. The two colored boys had the guns, I believe.
"Q And where did they sit?
"A Let's see; both of them in the back. I don't
[fol. 326] "know. Anyway, they told me—I was rushing up the street and they said, 'Make this light.'
"Q Wait a minute. The white boy sat in the front seat by you?
"A I think it was the white boy. I think so. I don't know.
"Q All right. Now, the guy that did the shooting, where did he sit?
"A He was in the back.
"Q All right. Where?
"A There was two guys in the back, you know.

"Q Where in the back did he sit, which side?

"A I really don't know. I didn't pay that much attention.

"Q Who told you where to drive?

"A The guy in the—I think it was the guy in the back.

"Q Which guy?

"A The short one.

"Q What did he say to you?

"A He said, 'Man, make it.' He said, 'Get this light.'

[fol. 327] "I was speeding and I was thinking of stopping at the light, and he said, 'Make this light.'

"Q When all four of you first sat in the car, before you started the car in motion, what was said to you and by whom?

"A I don't know who said it, but, anyway, they said—somebody said, 'All right, get it out of here.'

"Q Was it the guy sitting next to you?

"A No, it was from the back, come from the back somewhere.

"Q All right. Now, let's try again and remember. Who was sitting where in your car? You were driving?

"A Yes.

"Q Who was sitting next to you? Was it the short colored guy or the tall colored guy or the white boy?

"A I don't know.

"Q All right. Now, let's say we've got the car in motion and somebody has already said, 'Let's get out of here'; is that right?

"A Right.

"Q And you headed north on Holmes, is that correct?

"A Right.

[fol. 328] "Q How far north did you drive on Holmes?

"A To the red light.

"Q What street crosses Holmes at the red light?

"A 62nd, isn't it?

"Q You're going north from 61 something Holmes.

"A 60th, 61st?

"Q I don't know; you tell me.

"A I really don't know.

"Q At any rate, how far north did you drive before you turned?

"A To the red light.

"Q To the red light?

"A Right. And it was on red.

"Q And which direction did you turn?

"A I turned left and went across the railroad tracks and made another left and went down another two blocks or something, and that's where they got out at.

"Q What kind of neighborhood is it where they got out?

"A It's right near the railroad tracks.

"Q How far across the railroad tracks did you drive west on this street that you turned left on?

[fol. 329] "A I think it was the first street after I crossed the tracks.

"Q And how far down to your left on this street did you drive?

"A A block or two. I really don't know.

"Q What did you see when you got there?

"A I turned right. They jumped out of the car and the car was running, I know that. And I heard the door slamming. I saw the car was moving on when they was getting in.

[fol. 330] "Q Did somebody tell you where to stop?

"A Sure they did. They told me exactly where to—turn here and turn here and stop here.

"Q And where were you when they told you to stop?

"A Somewhere in that neighborhood, 61st, we crossed back and came back down.

"Q You left this little liquor store, went north, made a left, went across the tracks to the first street and made a left?

"A Mm-hmm.

"Q And how far south did you go then?

"A I'd say about two blocks.

"Q And who said, 'Stop here'?

"A I really don't know. I wasn't paying that much attention.

"Q Where did you stop?

"A I stopped when they told me. I think it was 60th, 61st.

"Q Which direction were you going?

"A I turned right and they got out and went straight up the street. That's where their car was at.

"Q What kind of a car?

"A A green Ford.

[fol. 331] "Q What year or model?

"A A '57 I think.

"Q Was there anybody in it?

"A Sure, somebody was in it. Like I say, there had to be, when I turned the corner and I noticed the car and I pulled up like the guys told me.

"Q Let's go over this again. You went north on Holmes, left at the red light?

"A Mm-hmm.

"Q Across the tracks and left at the first street, and down about two blocks and then they told you to make a right, is that right?

"A Yeah.

"Q And how far right did you go before—

"A I just pulled around the corner, and after they got out, I backed out and went straight home.

"Q Which direction was their car headed?

"A They was going straight back to West Slauson—not Slauson—Slauson this side—they was going south.

"Q Now wait a minute. I think you are confused a little bit. Slauson is north, right?

"A I went down, going to West Slauson, and went left, went down and turned left and they was headed

[fol. 332] "back south. I think it's south."

THE COURT: I will ask you to stop there, please.

Ladies and gentlemen, tomorrow is Wednesday and that is my probation and sentence day, so we probably cannot get started until about 10:00 o'clock.

I wish to remind you again of the admonishment that you are not to discuss this case among yourselves or with anyone else, not to form or express any opinion with respect to the case until the matter has finally been submitted to you for your decision.

We will recess until 10:00 o'clock tomorrow morning. I will ask counsel to try and be here at 9:30.

MR. ROSEN: What time?

THE COURT: 9:30—as close to it as you can.

(Whereupon the afternoon adjournment was taken until 10:00 o'clock a.m., Wednesday, June 23, 1965.)

[fol. 333] LOS ANGELES, CALIFORNIA,
WEDNESDAY, JUNE 23, 1965: 9:40 AM

(The following proceedings were had in chambers:)

THE COURT: The record may show we are in chambers again with the attorneys to discuss the Bosby statement.

Mr. Rosen, I read the statement last night, too. You probably made more extensive notes than I did, but—

MR. ROSEN: I went over this statement carefully, your Honor. It is not an easy job to delete and change and leave the context there. However, I think I have done it with what you had in mind, and as fair as I could be to all parties concerned.

Here is what I have. On page 1 of this statement, I think lines 22 through 25 should be deleted.

THE COURT: I agree.

MR. ROSEN: On page 2, I think line 1 should be deleted.

THE COURT: Yes.

MR. ROSEN: With regard to line 2, I have made some changes.

I would strike the name of Mr. Cooper and use the words "another man." "Did you and another man meet some place yesterday with two other persons?"

THE COURT: Agreed.

MR. ROSEN: On line 8 of page 2 I would strike the name of Gilbert Cooper and use the words "this other man."

[fol. 334] THE COURT: Agreed.

MR. ROSEN: On line 10 I would strike the word "Cooper" and use "this other man."

THE COURT: Agreed.

MR. ROSEN: On line 14 I would strike the word "Cooper" and use "this other man."

THE COURT: Agreed.

MR. ROSEN: On page 3 on line 3—

MR. WALTON: Wait a minute. Before we do that page, I object to all of those on the grounds that it leaves it open for the jury to speculate that this other man is Harrington.

THE COURT: The objection is overruled.

MR. ROSEN: Page 3, line 3, I would strike the name "Gilbert Cooper" and use "this other man."

MR. WALTON: Your Honor, in addition to that, may the record show that I object to all of these deletions of specific names where it incorporates some more ambiguous phrases to cause the jury to speculate it might be the defendant Harrington.

THE COURT: Yes, the objections are all overruled.

MR. WALTON: Thank you.

MR. ROSEN: On page 3, line 6, I would strike the word "Cooper" and use "this other man."

THE COURT: Okay.

MR. ROSEN: On page 3, line 8, I would strike the word "Cooper" and use "this other man."

[fol. 335] THE COURT: Agreed.

MR. ROSEN: Page 3, line 13, I would strike the words "a male Negro and a male white" completely, they are not necessary there.

It would read, "Did you meet two other persons yesterday and did these other persons go with you," and I would strike the word "Cooper" and put in "the other man."

". . . did these other two persons go with you and the other man within a couple of blocks of the market?"

You see, when he says "a male Negro and a male white," I think that this is actually—particularly "a male white"—is prejudicial to Harrington and unnecessarily so.

THE COURT: All right, I'll go along with it.

MR. WARNBERG: Let me have that just once more.

MR. ROSEN: All right. The words "a male Negro and a male white" will be stricken, and the word "Cooper" would be stricken and substituted therefor would be the words "the other man."

[fol. 336] MR. ROSEN: On Page 4, your Honor, line 26, I would strike the words "was Gilbert Cooper," and put in the words "were the other men," so the question would read, "Where were the other men standing at that time?"

THE COURT: I agree, because the answer—

MR. ROSEN: That's right.

THE COURT: The answer is consistent; it says, "All I know, they were in the store at this time." I think that is fair.

MR. ROSEN: That's right.

THE COURT: We will do that.

MR. ROSEN: On page 5—

THE COURT: Perhaps, excuse me—

MR. ROSEN: Yes?

THE COURT: Mr. Warnberg, I don't know how you write, but I write very poorly. If someone had to read my writing they might not be able to do it. Maybe Sergeant Vaughn should make the rest of the corrections, himself.

WITNESS VAUGHN: I can read Mr. Warnberg's writing.

MR. ROSEN: All right, sir, on page 5, line 2, I would strike the words, "Gilbert Cooper and," and change the word from "two persons," to "three persons," so it would read, "That is, the other three persons were in the store"; that is the context after that question.

THE COURT: Agreed.

MR. ROSEN: Now with regard to line 4 of page 5, I [fol. 337] would strike in the answer the words "Gilbert, oh, yes, pardon me, Gilbert." I would substitute for those words the words "one of the men," so that it would read, "One of the men came in and I hadn't came back from the box"; and I would strike the words, "and he asked him about cashing a check for him, I think, so"; then also I would strike the words in the next line, "to get the check or something like that, I think, because I know he didn't even come back in."

So that the question would read as follows: "One of the men came in and I hadn't came back from the box. He went back outside to his car."

This eliminates the use of the name of Gilbert and still leaves the context of what the answer is, in my opinion.

THE COURT: I don't think it really does here because this is part of the plan he is talking about, apparently, about one of them was going to cash a check, and so on and so forth.

MR. ROSEN: Well, perhaps it may be advisable to strike the whole question and answer.

THE COURT: I don't think so.

MR. WARNBERG: No.

THE COURT: I think, frankly, the only thing that should be stricken there is in the answer, is, "Gilbert, oh, yes, pardon me, Gilbert came in." You say, "a man came [fol. 338] in," instead of those words and leave the rest of the answer.

MR. ROSEN: That will be satisfactory.

THE COURT: So we will strike "Gilbert, oh, yes, pardon me, Gilbert," and substitute the words, a man came in."

[fol. 339] MR. MOORE: Just so I get my two cents in for this moment, I will be quiet, I want the record to show my position and I will be quiet.

I don't approve of these corrections because I don't believe they are accomplishing what we are seeking to accomplish; that is, to say, eliminate the prejudicial effect against the other defendants. I just make two examples: here you eliminate the word "Gilbert" and "Gilbert" and that is fine, except you then say, "he came back from the

box, asked about cashing a check, he went outside to get the check," or something like that.

You can eliminate the word "Gilbert" all day but after you read the rest of it the only answer is that Gilbert is the one that cashed the check and went outside, so that is my thought on that, and for the moment I will go back to page 2, for example, lines 8 through 15, and I noted the corrections made there, but you can strike the name "Gilbert Cooper" or put "the other man" in there or whatever you want to, but the rest of the context there is that there was conversations about robbing a place with this other man, and this is tending to prove up a conspiracy.

I know your Honor has stated we are not here ruling on that aspect, you will give other instructions to the jury about how these statements are to be used, but I am stating that they cannot but have an effect, the jury having heard that this man Bosby is discussing robbing with [fol. 340] other persons.

This is tending to prove a conspiracy, which has not been proven by extrajudicial statements. That is why I am objecting to these corrections.

Thank you.

THE COURT: The objection is overruled.

MR. WALTON: I will join.

THE COURT: Overruled.

MR. ROSEN: I went on then to page 5, line 7, and I would strike the word "Cooper" and put in "this fellow," and also I would strike the words in the other line, "with his check."

The question would read: "You were in the store at that time when this fellow left and came back in?" I struck the words "with his check" for the very reason that Mr. Moore just stated.

THE COURT: I understand it. Those words will remain and the other correction may go in.

In other words, line 7, strike the words "when Cooper left" and it will be "when the other fellows." Other than that, it will be the same.

MR. WARNBERG: In other words, "When the other fellow" instead of "this fellow"?

THE COURT: No, line 7, strike "Cooper."

MR. WARNBERG: And substitute "when the fellow left and came back"?

[fol. 341] THE COURT: Yes.

MR. ROSEN: Page 5, line 10, I would strike the word "Gilbert" and put the word "him" in place of it.

THE COURT: Agreed.

MR. ROSEN: Page 6, line 4, I would strike the words "Gilbert Cooper and the other two fellows" and substitute therefor "the other three fellows."

THE COURT: Agreed.

MR. WARNBERG: All you have to do is change "two" to "three"?

THE COURT: And strike "Gilbert Cooper."

MR. ROSEN: On page 6, line 6, I would strike the word "Cooper" and put the word "someone."

THE COURT: Agreed.

MR. ROSEN: On page 6, line 8, I would strike the word "Cooper" and put "someone" in two different places on that line.

THE COURT: Agreed.

MR. ROSEN: Turning to page 8, line 6, I would strike the words "Gilbert Cooper and"—that is line 6—I would strike the words "two persons"—

THE COURT: You want to change the "two" to "three," don't you?

MR. ROSEN: Change it from "two" to "three" and make it "three persons" so that question would read, "All right, now, at the time this pop or gunshot went off, where were these other three persons in relation to the cash register?"

[fol. 342] THE COURT: Agreed.

MR. ROSEN: On page 8, line 26, I would strike the words "Gilbert Cooper or the other two persons."

THE COURT: Agreed.

MR. ROSEN: On page 9, line 10, I would strike the words "Gilbert Cooper or either of the other two," and insert "any of the three."

The question would read: "Did you see any of the three companions have a gun in their hand . . ."

THE COURT: Agreed.

MR. ROSEN: On page 10 I would delete lines 1 through 3.

THE COURT: Agreed.

MR. WARNBERG: Let me have that once more.

MR. ROSEN: Delete lines 1 through 3 on page 10.

I would delete lines 13 through 16 on page 10.

THE COURT: Agreed.

MR. WARNBERG: Are you starting with line 13?

THE COURT: 13 through 16.

MR. ROSEN: 13 through 16.

I would delete lines 21 through 26 on page 10.

THE COURT: Agreed.

MR. ROSEN: On page 11 I would delete lines 1 through 22.

THE COURT: This is all relating to Rhone, isn't it?

MR. WALTON: Beginning on line 13 it begins to talk about Harrington.

[fol. 343] MR. ROSEN: And also the Caucasian.

THE COURT: You said 1 through what?

MR. ROSEN: 1 through 22, your Honor.

THE COURT: Agreed.

MR. ROSEN: All right. On page 12, line 18, I would strike the words "Gil Cooper" and insert instead "one man."

And then I would strike the words "his own" and put in "that," so that the question would read "One man stayed in that vehicle?"

THE COURT: Okay.

MR. ROSEN: On page 12 I would delete lines 19 and 20.

THE COURT: Wait a minute. Oh, I beg your pardon, I thought—

MR. ROSEN: Excuse me. Line 17, the word "Gil" should be stricken and "one man" inserted instead; "Everybody got out of the car but one man."

THE COURT: Yes.

MR. ROSEN: All right. Lines 19 and 20 I would delete entirely.

THE COURT: Well, is there anything wrong with leaving 20 in and just say, "Everybody drove away," without having the question?

MR. ROSEN: There is nothing wrong with that.

THE COURT: All right, let's do that. Eliminate 19

[fol. 344] and 20, but the answer on line 20 will stay in.

MR. WARNBERG: That will tie in with the answer "Yes" previously.

THE COURT: Right.

[fol. 345] MR. ROSEN: All right. Page 13 on line 2, I would strike the words "Gilbert Cooper's" and put in the word "the"; ". . . pulled up in the Mercury."

THE COURT: Agreed.

MR. ROSEN: On line 6 of page 13 I would strike the words, "Now, Charles, that's his."

THE COURT: Agreed.

MR. ROSEN: On line 14, page 13, I would strike the words "Gil then" and insert "another man then."

THE COURT: Agreed.

MR. ROSEN: On line 15 of page 13 I would strike the words "This friend of Charles'," and then insert the words "the person to hold a conversation."

THE COURT: Agreed.

MR. ROSEN: Page 13, I would delete lines 17 through 19.

THE COURT: Agreed.

MR. ROSEN: On line 20 I would strike the words "Charles say" and insert "was said"; also "did," strike. "What was said to this other person regarding this market and the stickup?"

THE COURT: Agreed.

MR. ROSEN: And on line 22 of page 13, instead of the words "told him," I would insert the words "was told."

THE COURT: Agreed.

MR. ROSEN: All right. On page 14 on line 2 I would strike the words "Did Charles say" and insert the words [fol. 346] "was said."

THE COURT: Agreed.

MR. ROSEN: Line 4, I would strike the word "he" and insert the word "was."

THE COURT: Agreed.

MR. ROSEN: On line 25 of page 14 I would strike the words "Charles and this Caucasian," and insert the words "two of the fellows."

THE COURT: Agreed.

MR. ROSEN: On page 15, line 24, I would strike the word "one"—or rather, excuse me—"this," and insert the word "one," and strike the word "Charles."

So it would read: "One guy was driving and the other guy was sitting on the other side."

THE COURT: Agreed.

MR. ROSEN: I would strike at page 15—I would delete lines 25 and 26.

THE COURT: All right, agreed.

MR. ROSEN: On page 16, your Honor, I would delete line 1, the question and answer, because to follow the continuity.

THE COURT: All right, agreed.

MR. ROSEN: Line 6 of page 16, I would strike the words "and Charles."

THE COURT: Agreed.

MR. ROSEN: On line 16 of page 16, I would strike [fol. 347] both the question and the answer.

THE COURT: Agreed.

MR. ROSEN: On page 17 I would strike—delete lines 10 through 12.

THE COURT: Agreed.

MR. ROSEN: On line 13 I would strike the words "and Gil."

THE COURT: All right.

MR. ROSEN: On line 16 of page 17 I would strike the words "he had cashed his check there before." I think that refers specifically to Cooper without naming him.

MR. WARNBERG: Do you think you can get that from the question?

MR. ROSEN: Well, the question is, "What do you base this estimate of amount of money on?"

And he said that he based it on the fact that he had cashed checks there before, and I'm leaving that in.

MR. WARNBERG: Well, he doesn't refer to any particular individual.

MR. ROSEN: It refers to himself.

THE COURT: Well, it refers to himself first, and then he said he had cashed his check there before, which could refer to Cooper.

MR. ROSEN: I think the context of it would be that it does refer to Cooper.

THE COURT: All right. Strike it.

[fol. 348] MR. ROSEN: On page 17, with regards to lines 19 through 21, this presents something of a problem. Here is the way I edited this.

I would strike the words on line 19, "Charles and this other person," and insert the word "anyone."

Then I would strike in the answer on line 20 the entire answer and would insert the words, "I talked about it."

Now, I have done that because I think that that is the context of that question and answer. It would read then, this:

> "Q Did you tell anyone that you expected to get between fifteen hundred and three or four thousand dollars out of the grocery store?
>
> "A I talked about it."

MR. WARNBERG: With other persons?

MR. ROSEN: Well, he only talked about it to one other person.

THE COURT: Well, I think you should add there, "I talked about it with—"

MR. ROSEN: "With one of the men."

THE COURT: "With one of the men."

MR. ROSEN: All right. "I talked about it to one of the men."

All right. On page 17, I would delete line 25, the question and answer on that line.

[fol. 349] THE COURT: 25?

MR. ROSEN: On page 17.

THE COURT: How about 22?

MR. ROSEN: Oh, I had a change on 22. I would strike the word "Charles" and insert the words "one of the men."

THE COURT: Agreed.

MR. ROSEN: And did you delete 25, the question and answer?

THE COURT: Wait a minute. Well, in context, if you are striking on line 22 "Charles" and putting "one of the men," the rest of it follows interpretive of that.

MR. ROSEN: Well, of course, by the question, I think we are inferring that they are talking about—well, actually, we are talking about Cooper, but actually—

THE COURT: No,

MR. ROSEN: —actually they are talking about Rhone.

THE COURT: Well, there is nothing about Cooper. If he didn't cash the check—he said, no, he just bought some merchandise.

So I would say that that should remain.

MR. ROSEN: All right. Page 18, line 19, I would strike the word "Gilbert Cooper" and put in "anyone."

THE COURT: Agreed.

MR. ROSEN: Line 20, I would strike the words "he thought he" and insert the word "one."

THE COURT: It doesn't make sense to me.

[fol. 350] MR. ROSEN: The question would read then, "Did anyone say to you about the amount of money that he was thinking or that he thought he would get out of this market?

"A No, one told me, 'Well, if they cash—' "

THE COURT: Oh, "One told me"?

MR. ROSEN: Yes.

THE COURT: Oh, I see. All right, fine.

MR. ROSEN: Line 21, I would strike the word "Charles" and insert the words "one of the men."

THE COURT: Agreed.

MR. ROSEN: On line 26, I would delete that line and I would delete the entire page, page 19.

However, I would insert there, your Honor, the context of that page, which is this: "I didn't have a gun. There were two guns used."

I had trouble with this page.

THE COURT: Well, I think you're right, because it's too—you can't do anything more about it.

MR. ROSEN: But the context of the page, of the questions and answers, is this, that "I didn't have a gun. There were two guns used."

THE COURT: Well, I think for Sergeant Vaughn's purposes, then, there should be a question, "Did you have a gun?

"A No, I didn't have a gun. There were two guns used."

[fol. 351] That will be in place of page 19.

MR. ROSEN: On page 20, I would delete lines 1 and 2. That is a continuation of page 19, which we deleted.

THE COURT: Agreed.

MR. ROSEN: On page 20, with regard to lines 10 through 12, I would reword the question and answer as follows:

"Q Who went in first?

"A One of the other fellows."

MR. WARNBERG: You are not talking about line 12, are you?

MR. ROSEN: I'm talking about questions from lines 10 through 12.

THE COURT: In other words, it will just read, "Who went in first?

"A One of the other fellows."

MR. ROSEN: Yes.

THE COURT: Agreed.

MR. ROSEN: On line 13, I would strike the word "Gilbert" and put in "one."

THE COURT: Agreed.

MR. ROSEN: All right. On page 21, with regard to the answer on lines 9 through 12, I would delete that entire answer and I would insert instead the following language:

"One of the other fellows and myself—about three weeks to a month before it happened."

I think that is the context of the answer without nam-[fol. 352] ing anybody.

MR. WARNBERG: You are now referring to line 8?

MR. ROSEN: Yes.

THE COURT: 8 through—

MR. ROSEN: 8 through 13, and leave the question and change the answer.

MR. WARNBERG: Give me your answer again.

MR. ROSEN: "One of the other fellows and myself—about three weeks to a month before it happened."

The question is: "When all four of you got together and were first talking about this thing, whose idea was it to take this particular store?

"A One of the other fellows', myself, about three weeks to a month before it happened.

THE COURT: Also you have got this line in there, "I said, 'Man, when I used to cash my checks here before, they kept quite a bit on hand.'"

MR. WARNBERG: Right.

THE COURT: That may stay in.

MR. ROSEN: All right.

THE COURT: It only refers to Bosby.

MR. ROSEN: All right. Then—

MR. WARNBERG: Now, your wording, first—

THE COURT: Now, your wording is okay except you will keep the line in, "I said, 'Man, when I used to cash my checks here before, they kept quite a bit on hand.'"

[fol. 353] MR. WARNBERG: All right.

And then strike everything in front of that except I wanted to get Mr. Rosen's wording.

THE COURT: All right, go ahead.

MR. ROSEN: All right.

"One of the other fellows and myself—about three weeks to a month before it happened."

Then, well—actually, I think I would strike lines 14 to 18 because the answer I just read would cover that; or you could leave those lines in and change the words on—

THE COURT: No, just strike them; 14 to 18. 14 to 18, strike them, it is similar.

WITNESS VAUGHN: Excuse me, I am not clear on line 8 through 13.

THE COURT: All right.

MR. ROSEN: The question would be, "When all four of you got together and were first talking about this thing, whose idea was it to take this particular store?"

The answer is, "One of the other fellows' and myself, about three weeks to a month before it happened. I said, 'Man, when I used to cash my checks here before, they kept quite a bit on hand.'"

Now, I would strike the last sentence there.

MR. WARNBERG: You mean on 13?

MR. ROSEN: Yes.

[fol. 354] MR. WALTON: Well, about "no one else was in on that," I would ask that that remain.

MR. ROSEN: That isn't quite right.

THE COURT: No, it isn't quite right. It is "no one was in on the initial talks."

MR. ROSEN: Well, one was in on the initial talks—

THE COURT: One was.

MR. WALTON: I think from the context of the answer, that is a proper statement. He is talking about a statement that he and Cooper had about three weeks to a month earlier and no one else was in on it, is certainly true.

MR. ROSEN: No one else other than he and Cooper, is what he is saying.

MR. WALTON: That's right.

THE COURT: That's right, and if you don't put Cooper's name in on it, then how can you say this?

MR. WARNBERG: Gentlemen, by striking the word "Gil," and striking the answer, wouldn't that be in substance correct, by just eliminating the word "Gil"?

MR. ROSEN: You can't. It is a problem.

THE COURT: Let's leave it just the way we have corrected it.

MR. ROSEN: That is all for page 22.

MR. WARNBERG: Mr. Rosen, we are striking 14 through 18?

THE COURT: Also 13 is out, too; 13 through 18, [fol. 355] page 21.

MR. ROSEN: Now, page 22, line 8, I would strike the word "Charles," and put in the words "another fellow."

THE COURT: Okay.

MR. ROSEN: On line 10 I would strike the words as follows "And he told me about his wife and she's on County. I never seen his wife; I never even been out to his house in Compton. It's in Compton some place."

THE COURT: All right.

MR. GORDON: Strike that?

MR. ROSEN: On line 15—

MR. WARNBERG: I am sorry—

MR. ROSEN: Did you get that?

MR. WARNBERG: Where did you start striking that, on line—

THE COURT: On line 11.

MR. ROSEN: It would be line 10 and a half, "And he told me about his wife and she's on County. I never seen his wife; I never even been out to his house in Compton"—

MR. WARNBERG: I'm sorry, that is not line 10, Mr. Rosen.

THE COURT: On 22.

MR. ROSEN: Page 22.

THE COURT: 10 and a half, okay?

MR. WARNBERG: All right, strike about the wife who is on County, "I never seen his wife"—

[fol. 356] MR. ROSEN: "I never even been out to his house in Compton. It's in Compton some place."

Now, on line 15 I would change the word "Gil" to "a fellow's."

On line 16 and a half on page 22 I would strike the word "He says, 'Well, good, I have to go and pick up the check,' plus I got to go and get a part time check."

I think that names Cooper without naming him.

THE COURT: All right, it may go out.

MR. ROSEN: On line 20 I would strike the word "Charles," put the question mark after the word "about."

THE COURT: Agreed.

MR. ROSEN: Page 23, I would delete lines 5 and 6.

THE COURT: Why can't we change "Charles" to "another fellow"?

MR. ROSEN: We could.

THE COURT: Do it that way.

MR. ROSEN: All right.

On line 7 I would strike the words "You and Gil and Charles and the patty and another colored stud."

THE COURT: Why can't we say, "You and the others"?

Well, as long as he says "five men," you are right; do it that way.

MR. ROSEN: On page 23, line 11, I would strike the words "Did you and Charles drive in Charles' car some place?"

[fol. 357] I would strike the answer, "No, I still rode with Gil," and I would strike line 13 and line 14 and I would insert as the answer to the question, "Okay, how did you leave the Wilmington area?

"A I rode with one man in one car and three others rode in the other car."

THE COURT: That is agreed; that gives us the substance of it.

MR. WARNBERG: "I rode with one man in one car"—

MR. ROSEN: "And three others rode in the other car."

On line 21 on page 23 I would strike the word "Gil" and put in the words "the car you were in."

The question would read, "and the car you were in drove right to 61st and Converse?"

THE COURT: Agreed.

MR. ROSEN: All right.

Page 24, your Honor, line 1 and a half, I would strike the word "Gil" and put in the words "one fellow.".

THE COURT: Agreed.

MR. ROSEN: On line 11, in the answer, I would strike the words "Charles and the other dude was," and I would put in the words, "two were."

The answer would read, These other two were together."

THE COURT: Agreed.

[fol. 358] MR. ROSEN: I would delete line 12 and 13.

THE COURT: Well, I think instead of "two were," let's use his language and say, "two was."

MR. ROSEN: All right.

I would delete lines 12 and 13.

THE COURT: Agreed.

MR. WARNBERG: My copy is not good on the lines.

MR. ROSEN: 11 and a half; we would strike the words "Charles and the other dude," and substitute the words "two was."

THE COURT: And the next question and answer out.

MR. ROSEN: I'm going down to line 18, I would delete, "You say there was Charles and the patty and another colored fellow. What happened to him?" I would strike that.

THE COURT: So it now reads, "Question: What happened to the other one then?

"A He was in the car."

MR. ROSEN: Yes.

THE COURT: Agreed.

[fol. 359] MR. ROSEN: Going down to line 24, I would strike the word "Gil" and insert the word "another fellow."

THE COURT: Agreed.

MR. ROSEN: On the same line I would strike the word "Gil" and insert the words "another fellow."

THE COURT: Agreed.

MR. ROSEN: And on line 24 and a half, I would strike the words "and he had one on his job."

You see, this refers directly to Cooper, in my opinion, unnecessarily so, without naming him.

THE COURT: All right, I will agree to that.

MR. ROSEN: All right, sir.

I would delete lines 25 and 26 on that page and line 1 of the next page.

THE COURT: All right.

MR. ROSEN: All right, on page 25 I would change line 4, strike the word "Gil."

THE COURT: Actually, you have to strike 2 and 3 because they don't make any sense—wait a minute—it doesn't make any sense to leave 2 and 3; strike 1, 2 and 3 on 25.

MR. ROSEN: On line 4 I would change the word "Gil" and insert "the other fellow."

THE COURT: Agreed.

MR. ROSEN: On line 5 I would strike the word "Gil" and put "him."

[fol. 360] THE COURT: Agreed.

MR. ROSEN: On line 7, I would strike the word "Gil" and put "he."

THE COURT: Agreed.

MR. ROSEN: On line 10 I would strike the word "Gil" and put "he."

THE COURT: Agreed.

MR. ROSEN: On line 17 I would strike the words "Charles and Patty" and also the word "Gil," and insert instead of the word "Gil," "the first fellow."

THE COURT: Agreed.

MR. ROSEN: Got that, Al?

MR. WARNBERG: So it now reads—

MR. ROSEN: "Where were the other two, where were they?"

MR. WARNBERG: Strike the word "now," "where were the other two, where were they when the first fellow came back in?"

MR. ROSEN: Yes.

THE COURT: Exactly.

MR. ROSEN: On line 21 I would strike the word "Charles and this Patty" and insert the words "these other two fellows."

THE COURT: Agreed.

MR. ROSEN: Line 24, I would strike the word "Charles" and put in the words "one of the fellows."

THE COURT: All right.

[fol. 361] MR. ROSEN: Page 26, your Honor—

MR. WALTON: Excuse me, doesn't that make it sort of unintelligible?

MR. ROSEN: "How far from the cash register did you ever see one of the fellows?

"A Not too far."

It doesn't make—

MR. WALTON: It is meaningless.

THE COURT: It is almost meaningless, but it keeps the statement.

MR. ROSEN: General context.

THE COURT: But it doesn't mean too much, I agree with you.

MR. ROSEN: All right, on page 26, your Honor, line 16, I would strike the words "was Gil" and insert the words—

THE COURT: I don't think it makes any sense if you have to strike "Gil"; it doesn't make any sense to keep it in because the answer is "I don't know," anyway. So I guess the whole question and answer—

MR. ROSEN: Except for one thing, he says, "Everybody was in the store," so I would refrain from line 16 through 21:

"Q All right, now, where were the other fellows when you heard the shot?

"A Everybody was in the store."

THE COURT: "I don't know, but everybody was in the store."

[fol. 362] MR. ROSEN: Yes, that is the context of that.

THE COURT: All right, that is the context; change it that way.

MR. WARNBERG: I have the question, "Now, where were the other fellows when you heard the shot?

"A I don't know, but everybody was in the store."

THE COURT: Exactly.

MR. ROSEN: All right. Page 27, no changes. 28, no changes.

29—we are almost through, Judge—

MR. WALTON: Excuse me, getting back to page 26, what about line 18?

MR. ROSEN: That is stricken.

MR. WALTON: You are going to strike that, along with—

MR. ROSEN: Strike all of that.

All right, on page 29, your Honor, I would strike—I would leave in on line 10, "All right, now, you have done pretty good so far with us and we appreciate your cooperation."

I would strike all the rest of that answer—or, question, rather, and the answer.

MR. WARNBERG: Instead, you would say—

THE COURT: He wants the name of the Patty that was—

MR. ROSEN: As a matter of fact, I would strike the whole rest of that page, your Honor, and through line 8 of page 30.

[fol. 363] THE COURT: I think you are right, there is no point in it; and leave 10 in down through "cooperation," and strike the rest of the page.

MR. ROSEN: Through line 8—

THE COURT: And through line 8 on page 30.

MR. ROSEN: No changes on page 31, no changes on 32, and one little change on page 33.

MR. WARNBERG: On page 30 what did you do, strike the first line?

THE COURT: No, on page 30, strike the first eight lines.

MR. ROSEN: Page 33, line 18 and a half, where he says: "Earl Brody," I think you ought to put the name "Junior" on there because he talked to Earl Brody, Junior.

THE COURT: Was it Junior?

MR. ROSEN: It was Junior that he talked to.

THE COURT: Do you all agree it was Junior that he talked to?

MR. WALTON: Junior told me that it was he that he talked to.

MR. ROSEN: So did the defendant; Junior told me that he talked to him.

THE COURT: All right, "Earl Brody, Junior."

MR. ROSEN: That is it.

THE COURT: I want to thank you officially, Mr. Rosen, for your help and cooperation. As I say, I read the transcript last night, but I didn't make as meticulous [fol. 364] notes as you did and I appreciate your efforts.

MR. WARNBERG: We have just one problem: My officer now is testifying to a revised statement and he is just a little perplexed, and in a way, he probably could be because he is not now reciting or giving a statement as it was actually given.

THE COURT: Well, he is not committing perjury because we have directed him to do it.

MR. ROSEN: I think what he can say, "In substance here are the questions and answers," using the words "in substance," because that is what he is relating, is the substance of it, not the exact language of it.

MR. WARNBERG: Does it put any reflection on him?

THE COURT: How can it put a reflection on him when the Court has ordered him to do it?

MR. WARNBERG: Well, could—

THE COURT: He can't answer to the jury and say, "This isn't an exact statement but this is what I have been told to do," because then we are not going to accomplish our purpose. He is not going to do anything wrong.

MR. WARNBERG: Actually, I think my statement to him was, "Does the statement fairly reflect the conversation?" And it does fairly reflect it, doesn't it?

THE COURT: I think so.

MR. ROSEN: Sure.

WITNESS VAUGHN: I don't. 40 per cent of it is out.

[fol. 365] THE COURT: Sergeant, I know how you feel. I went over this with you yesterday and I explained it to you yesterday. I don't want to go over it again.

WITNESS VAUGHN: I don't want to be facetious—

THE COURT: You are not being facetious, you are being argumentative, and you have a right to your point of view and I sympathize with your point of view; but, you have got a job to do and I have got a job to do. Whether you like the way I am doing my job or not is quite immaterial.

WITNESS VAUGHN: I just wanted it clarified, your Honor.

THE COURT: Clarify what?

WITNESS VAUGHN: I don't think that I am committing perjury or anything like that, but in response to Mr. Warnberg's question, "Is this the substance of your conversation?"—in essence, "No, sir, it isn't."

Now, how do we clarify that with the jury? I am sitting here testifying—

THE COURT: The jury is not going to see this statement.

WITNESS VAUGHN: I realize that, sir, but they will ask, "You mean this officer didn't ask any names? This officer didn't ask any addresses? This officer didn't ask descriptions of anybody?"

THE COURT: Well, they might conjecture about it, [fol. 366] sir, but none of these lawyers are going to cross examine you and ask you whether you asked them about names. So, it is never going to come out.

You are not on trial as being a good investigator or a poor investigator.

MR. GORDON: Your Honor, say one of the lawyers should take out in addition to ask if he asked any names, would you stop him?

THE COURT: No, I am not going to stop him. I will then let the officer testify about all the rest of the conversation that we have stricken here.

If any lawyer gets out of line to that extent, I would let him testify to all, because I think it would be extremely bad faith for any lawyer to question him on that basis now.

MR. WARNBERG: As I understand it now, we have no argument as to probable cause for arrest; we will go right into it and use the statements?

MR. GORDON: It is nice to get these things clarified before.

THE COURT: I think certainly I wouldn't have taken all this time to do that if you are going to start cross examining the officer. I will tell you, I will go this far with you: I will cite anyone for misconduct who argues to the jury that this officer, he may not have given you all the statements or he didn't even ask the names, so if [fol. 367] he didn't ask the names of the other people involved or some such reflection upon his ability to investigate and that he let something out or that his memory is poor because of that, I am going to cite you for misconduct because you are going to intimate to the jury that perhaps he doesn't know what he is doing or that his memory is bad because of the fact that he didn't do certain things.

It is only a reflection on you, because we have gone through these deletions.

Now, if that is what you want to do, tell me now and I will leave these statements in verbatim.

[fol. 368] Now, if that is what you want to do, tell me now and I'll leave these statements in verbatim.

MR. GORDON: Well, I think we should get a statement from the lawyers.

THE COURT: All right. I want to know what you're going to do. I'm warning you now, because, frankly, partially because of Mr. Walton's statement yesterday about this investigating officer. I don't know what you're going to do, after a situation like that.

I don't want that to happen again, or anything like it.

So I'll tell you now that if you intend to have any such argument, or if you intend to have any such cross examination to that effect, let me know now and all of this time will have been wasted, because I'm going to let him

give the conversation as it actually took place with all the names less these deletions.

Anybody have anything to say?

MR. GORDON: Shall we have a stipulation on it so that we know now how we—because some of the men have opposed these corrections, and I would like to know what my position is with my client before we go out and start our hearing.

I would just kind of like to know what the position of these fellows is.

MR. WALTON: Well, I think I made my position [fol. 369] known on the objections.

Largely here in the Bosby statement, we have a statement which is not, in essence, terribly incriminating against Harrington as it was originally given. He didn't even know Harrington's name.

Now, with the ambiguities, it becomes potentially very incriminating. That is why I made that objection.

THE COURT: I think you were the one that started this off, Mr. Walton, by saying, "Judge, I want you to take the time to go in there and edit it—"

MR. WALTON: Listen, Judge, I don't propose to cross examine at all. I have made the objections for the reasons which I have stated, and you have ruled, and I propose to leave it at that as far as these statements go.

THE COURT: Well, are you telling the Court that the Court has done something that makes it even worse for your client? Is that what you are telling the Court?

MR. WALTON: I made the objection—

THE COURT: No, answer my question directly. Are you telling this Court that what the Court has done by these deletions is make it look worse for your client than if the deletions had not been made?

MR. WALTON: I can't answer that question.

THE COURT: Oh, yes, you can, because you made the statement.

[fol. 370] MR. WALTON: Your Honor—

THE COURT: Do you read back what he said, Mr. Reporter? And you listen to what you said, Mr. Walton.

(Record read.)

THE COURT: That is exactly it. In other words, you are telnilg me that I have made it worse for your client by the deletions and the changes?

[fol. 371] MR. WALTON: I made specific objections to specific deletions, and your Honor overruled them, and I'm just willing to stand on that.

THE COURT: I'm sorry, Mr. Walton, you're not being truthful with this Court. He just read back your statement that you said. Doesn't that mean that I have made it worse?

I have other lawyers here. I ask you gentlemen, what does he mean by the statement?

MR. WALTON: Well, when your Honor says you made it worse, I am not directing any criticism at your Honor. I appreciate the fact that you have taken two or three hours to go through these statements in this way, because I feel what your Honor is doing is trying to correct a rather unfortunate situation, in that these statements are so vastly incriminating against one or more of the other defendants.

And then a Judge who will take the time in chambers to do this has my admiration. So I'm not being critical of your Honor, and your Honor is inviting me to be critical.

THE COURT: I am not. I am only reading your statement, which says that the ambiguities have now made it more incriminating for your client. That means to me that what I have done is made it worse for your client.

Now, I'm not talking about personal criticism of me, Mr. Walton. I want to know if what you think what I have done makes it now worse for your client. And if so, [fol. 372] I'm going to correct it and change it.

MR. WALTON: When the word "Cooper," say, is stricken from a context of these statements and the phrase, "this other fellow," or "one of the other guys," or something like this is inserted in its place, it leaves the jury to possibly say, "Well, the other guy was Harrington" or "The other guy was Rhone" or "The other guy was Cooper."

They might in total context land on Cooper as being the person to whom Bosby refers.

But that was the basis of objections already made.

THE COURT: All right, gentlemen, I'm going to change my ruling, if that's the way you feel about it. I have no alternative. You are telling me that I am making it worse for your client, which is, in essence, what you have done. I have no alternative but to leave the statements in as they were made. I don't see how I have any other alternative. You tell me that you are making an objection on that basis.

Any of you other lawyers have any statements to make with respect to this?

MR. GORDON: Well, it's nice to get a clarification to, at least, what the attitude is.

Now, I'm very sorry that we can't have the clarifications, but—

MR. ROSEN: Well, it was my opinion, Judge, that other than severance, which, of course, would have been [fol. 373] most advantageous to all of these defendants, what you have done is of advantage to these defendants by your deletions.

Certainly Harrington is going to suffer by Bosby's statement it its original form more than in its deleted form.

THE COURT: Sir, that may be true, but that is not what his lawyer has said.

MR. ROSEN: That is my opinion,

THE COURT: I respect that, and I respect your opinion. That is why I have tried to do what I have done. But when his lawyer is telling me it will make it worse for him and he doesn't want it, then I have no alternative but to do what the lawyer requests, in my opinion, because I'm not trying the case for Mr. Harrington.

MR. ROSEN: I understand that, your Honor.

THE COURT: Mr. Walton is trying it.

Mr. Moore, do you have any comments, sir?

MR. MOORE: No, sir.

THE COURT: All right.

MR. GORDON: Well, your Honor, don't you think—Mr. Moore has expressed himself here some in the past with reference—and I think that we ought to get at least an agreement among the lawyers here before his Honor makes a ruling, whether we want it or don't want it.

I'm for it; I'm for the deletions. Because I certainly think it has helped us tremendously.

[fol. 374] Now, what is going to be the conclusion?

THE COURT: Well, you are apparently for it.

MR. ROSEN: I am.

THE COURT: And Mr. Moore and Mr. Walton have objected to the changes.

MR. GORDON: What is your position now, Moore? Do you want the corrections or not?

MR. MOORE: Well, I don't see—you see, I'm trying to represent my client as best I can.

Now, I understand your Honor's position, and I'm not telling you what to do. You make your rulings and you have fairly, I'm sure, in your belief.

I am only saying, starting anew, then, so I'm not misquoted, severance was what we wanted so this problem wouldn't arise.

Now, whether we are right or wrong, severance is denied.

Now, the statements—I say this only—that by striking a word, as I have indicated before, doesn't accomplish anything unless you strike the ultimate and that comes from striking the word.

If you, say, strike the name "Gilbert Cooper cashed a check," you strike the name "Gilbert Cooper" and put in "the other man cashed the check," it's the same as saying "Mr. Cooper."

But I go further and say, as I have, that when they [fol. 375] talk—one man here talks that he talked with the other men about robberies, about going in with the check, and one man was there, I think you are building up the conspiracy through one man's statement.

That's all I am saying is, that as long as you let one man talk about conspiracy, not what he did but what other people did, you are adding evidence to the other people's case, even though the Judge instructs the jury that this statement—for example, Mr. Bosby's—is going to be used against Mr. Bosby, I say any reference he has to talking to other people, planning the job with three other men, and all that, can't help but be in the jury's mind that these three other men planned the robbery with Mr. Bosby, and therefore are all guilty of conspiracy to rob.

[fol. 376] THE COURT: All right, gentlemen. I think it is perfectly clear as to what the Court's course of action must be. That is to let the statements in in their entirety.

I think it has certainly taught me a lesson—

MR. WALTON: Well, wait a minute.

THE COURT: We learn every day.

Don't tell me to wait a minute, Mr. Walton. Please don't tell me to wait a minute, sir, when I am speaking. I think that you owe me the courtesy, sir, of allowing me not only to finish but of addressing me properly.

MR. WALTON: I'm sorry. I apologize. Your Honor is correct.

THE COURT: Without going into that in any further detail, I appreciate the efforts of counsel in trying to arrive at a solution in this case.

I thought I was doing what I considered to be the fair thing. I certainly wanted to do it that way, and I think I tried to do what very few judges have done in the past, trying to make this a fair trial. I see that my efforts have been unsuccessful.

And I will follow the law as it exists today and not try any innovations. I sincerely believe that the motion for severance was properly denied.

I know that these statements are admissible as to the [fol. 377] defendant making the statement, and that there is no reason to strike any portion of the statements under the existing law as I understand it.

But I have tried to accomplish something that apparently cannot be accomplished, because of the objections of counsel.

The Court will now rule that the statements may be made in their entirety, with the admonishment to the jury that the statement is admissible only as against the defendant making the statement and for no other purpose as against any other defendant.

Now, there was a statement started yesterday, the reading of the statement, and I think certain deletions were made which should not have been made under the existing circumstances.

May I see the statement?

MR. WARNBERG: Yes, your Honor. I believe that was the statement of Gilbert Cooper to the officer.

THE COURT: Yes, it was.

MR. WARNBERG: He got up to where the clip is located on top of that, Judge.

THE COURT: All I want to know is, was there anything deleted up until the time we got to that clip?

WITNESS VAUGHN: No.

MR. WARNBERG: I believe not, your Honor. I believe that as far as he went yesterday—and that is as far [fol. 378] as he went, right where you have the clip there.

THE COURT: Well, I have it on my desk. But since that is the case, why, we will continue from that point.

MR. WARNBERG: Okay, your Honor. And we can proceed.

THE COURT: And we are ready to proceed.

(The following proceedings were had in open court without the presence of the jury:)

THE COURT: Mr. Gordon, I understand you wish to make a motion outside the presence of the jury?

MR. GORDON: Yes, your Honor. I wonder if the bailiff could bring my client out here so that you could observe him? He complains to me—

Or, maybe I better say this in his presence, because—

THE COURT: All right, get all the defendants out.

MR. GORDON: May I proceed, your Honor?

THE COURT: Yes, sir. The record may indicate the defendants and each of them are present.

MR. GORDON: Your Honor, my defendant complains—

You say you killed a roach in your cell?

DEFENDANT RHONE: Yes.

MR. GORDON: I think he is talking about a cockroach in his cell. And apparently he was disciplined for having done so. He was put in the hole, he said. His socks were taken away from him.

And what else?

[fol. 379] DEFENDANT RHONE: Shoestrings.

MR. GORDON: And his shoestrings.

DEFENDANT RHONE: My toilet articles. I couldn't comb my hair.

MR. GORDON: And he is just embarrassed to come before the jury this morning. He feels that it might prejudice his case, your Honor.

He asked me to make this protest to you.

Was this for killing a cockroach?

DEFENDANT RHONE: Killing a nest of them, you know, a next of cockroaches.

MR. GORDON: Well, maybe this is—

THE COURT: Well—

MR. GORDON: The word "roach"—

THE COURT: He seems to have the same coat on today that he had on yesterday. Is that correct?

DEFENDANT RHONE: Right.

THE COURT: Am I right, Mr. Rhone?

DEFENDANT RHONE: Yes, sir.

THE COURT: You didn't have a tie on yesterday, either, did you?

DEFENDANT RHONE: No, sir.

THE COURT: As far as your shoes are concerned, I can't see them from here. Where you are sitting at the counsel table, the jury can't observe them.

You're not going to get up and testify today, so they [fol. 380] can't see you today.

Now, I will instruct the Sheriff to give you back your socks and have them look into the situation as to why you were disciplined, and try to take you off discipline during the course of this trial.

But I want to tell you this, sir. I'm not running the Sheriff's Department.

DEFENDANT RHONE: I know that.

THE COURT: I am only running this court. And I have a difficult time as it is to do that.

But I certainly want you to be protected and I want your rights to be protected.

On the other hand, I think you have to realize that you're going to have to conduct yourself in the jail.

You are not subject to discipline.

Now, I'm not going to hold a hearing as to whether you were properly disciplined for killing cockroaches or not killing cockroaches or why they disciplined you. So

whether it was a good reason or not, I'm not going to go into it.

The point is, if you will promise me that your conduct is going to be good from now on, I will try and talk to the Sheriff and have them take you out of the hole during the course of this trial so that you can be in a better mental frame of mind to handle the trial and stay here during the course of the trial.

[fol. 381] Now, do we understand each other?

DEFENDANT RHONE: Yes, sir.

THE COURT: All right. Bring the jury in, please.

[fol. 382] (The following proceedings were had in open court, in the presence of the jury:)

THE COURT: Good morning, ladies and gentlemen.

I want to thank you very much for your kindness and consideration. I know it takes a great deal of patience for you to sit back there and wait and wonder what is going on and when will you ever come back into the court and what is that Judge doing, and all of that.

I can assure you I have been here since 8:00 o'clock this morning, and I don't think I have rested for one minute.

So if you will just please bear with me, that these things do happen and we can't help them, we will get on with the trial, and I hope ultimately to conclude it.

Thank you very much for your kindness and consideration.

CHARLES WILLIAM VAUGHN,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

THE CLERK: The witness is still under oath. Would you state your name for the record?

THE WITNESS: Charles William Vaughn.

THE COURT: You may continue, sir.

Before you continue; ladies and gentlemen of the jury, [fol. 383] I think I told you this before the Sergeant testified with respect to the particular statement which he

is reading, which was a statement he said was given, questions and answers of Gilbert Cooper, one of the defendants in this case.

I think I told you this, but for purposes of emphasis and so that there will be no possible misunderstanding, I want you to understand, and you are instructed, that the evidence which you are hearing now with respect to Gilbert Cooper is admissible and is being received by the Court and for your consideration only as to the defendant Cooper and not as to any other defendant or any other issue in the case.

Thank you, sir. You may continue, sir.

DIRECT EXAMINATION (Continued)

THE WITNESS: (Reading:)

"Q You just got through telling me you made a right.

"A I told you I made a left both times, and then I backed out and then I turned right and went home.

"Q All right, this is north here, and here is 62nd Street. Let's say you drove up here to the red light —this is Holmes. You go up here and you make a [fol. 384] left, right? And then you are heading west, right? You are going north and you make a left and you are heading west.

"A Right.

"Q And you go across the railroad tracks?

"A Mm-hmm.

"Q To the first street?

"A Right.

"Q And you make another left?

"A Mm-hmm.

"Q And you drive down about two blocks?

"A Approximately, yes. Something like that.

"Q Which direction do you go from there?

"A I think they told me to turn right and I pulled up in there.

"Q So now you are going west.

"A Yeah, headed west, and that's when they got out.

"Q How far around here was their car parked?

"A (No answer.)

"Q Was their car parked heading west?

"A No, they told me to turn west, so I pulled up and they got out and went the same way home, went back up that way.

"Q In other words, they kept going this way and you went this way?

"A I backed out and went up one block and [fol. 385] turned right and went straight across and went home.

"Q Now, you backed out this way?

"A Yeah.

"Q Out onto the street and you headed this way?

"A Right.

"Q And you were behind these people. Could you see them?

"A Well, they was quite a ways ahead.

"Q How far south did you see them going?

"A They was crossing, I think it was a little railroad track or something. Anyway, I turned off the first street after I backed out and they kept straight, and that's the last time I seen them.

"Q And the three of them got out and got into this other car?

"A Yeah.

"Q And what did they do, run back this way? Where was this car parked?

"A That way.

"Q Across this street?

"A I turned here.

"Q Yeah.

"A Their car was just like this. It had to be.

"Q Which side of the street was their car parked [fol. 386] on?

"A It had to be on this street here.

"Q In other words, you let them out and they ran south and got into their car and kept going south?

"A Right.

[fol. 387] "Q Now, was this car a four-door, two-door, or what?

"A (No answer.)

"Q Did you see them getting into the car?

"A Not exactly see them getting in. But I heard doors slamming, and then I backed out, then I went up one block and turned.

"Q What year, model car did you say it was?

"A '57.

"Q What kind?

"A Ford.

"Q Do you know what '57 Ford's taillights look like?

"A Mm-hmm.

"Q What do they look like?

"A Well, they're big.

"Q What do you mean, 'They're big'?

"A About like this, and got a little fin on the side.

"Q And you saw it from the rear?

"A I would say it was a '57. I don't know, I couldn't swear to it.

"Q What color green do you think it was?

"A It was—no, I don't know. Kind of rusty green, something like that, I guess.

"Q Kind of light green?

[fol. 388] "A Kind of rusty. It wasn't shiny or nothing.

"Q Faded paint job?

"A Yeah.

"Q Do you remember which side of the car they got into?

"A I didn't see them get into the car.

"Q Now—

"A I—like I said, I heard the door slamming and I heard the car pulling off.

"Q Last time you saw them, they were going south on the street that you turned left off westbound street off of, is that right?

"A Yeah, and they went straight up.

"Q And they went straight south?

"A Right.

"Q And was there anybody in this car that they got into when they got out of your car?

"A There had to be. It was moving, and I heard the doors slamming, I know that.

"Q Did you see anybody in it?

"A I turned the corner, I didn't know what kind of a car this really was then. Yeah, I'm pretty sure I saw somebody in it, and the motor was running.

"Q Where was the person sitting?

[fol. 389] "A He was under the wheel.

"Q Was he colored or was he Caucasian?

"A He was colored. I know that. So it had to be running, because I heard doors slamming, and I heard it pull off and wheels hollering.

"Q By the way, how were you dressed when you went into this liquor store?

"A Sweater, hat.

"Q Same clothes you have now?

"A No, I had a brown sweater.

"Q This hat?

"A Brown hat.

"Q What kind of trousers?

"A Same trousers.

"Q Shirt?

"A Same shirt.

"Q A different hat and different sweater?

"A Right. This is what I work in, so I went home and changed for work.

"Q Your left sleeve of your sweater is soiled. What's that?

"A That's paint off my job.

"Q Who's the guy that you went to Tijuana with?

"A Willie Grisby.

"Q How do you spell his last name?

[fol. 390] "A G-r-i-s-b-y, I think.

"Q Is it Grigsby or Grisby?

"A Grisby.

"Q How long have you known him?

"A Well, I been working with him at the Manco Copper Mill.

"Q How tall is he?

"A Oh, he's short, dark, bald.
"Q How old is he?
"A About 27, 28.
"Q Does he wear a hat?
"A Mm-hmm.
"Q Was Willie Grisby with you this afternoon?
"A (No answer.)
"Q Was he?
"A Look, what you trying to do to me, huh?
"Q I'm asking you, was he or wasn't he?
"A There was nobody with me this afternoon.
"Q All right.
"A Man, you want the man's telephone number, reference, I mean, I give it to you, you know.
"Q Who's Mike Deville?
"A Well, he works out there with Grisby, too.
"Q Where does Grisby work?
[fol. 391] "A Manco Copper Mill.
"Q What's Mike look like?
"A Like anybody else, heavy, light, or whatever.
"Q That's a good description. What's your wife's name, by the way, Gil?
"A Lucille.
"Q Does she work?
"A Yes.
"Q Where does she work?
"A Statham's.
"Q Statham's?
"A Statham's Instrument.
"Q What is it? A—
"A It's an electronic plant.
"Q Electronic? What's the gal's name that lives in the apartment with you there, same apartment building, near by? What's her name? Maxine? Her boy friend is the one your wife doesn't like you to run around with. What's his name?
"A My neighbor's?
"Q She's got a couple of kids.

"(Off record at 1:08 a.m. Statement resumed at 1:09 a.m.)

"BY SGT. WHITE:

"Q Who is Dolores Blackmon?

[fol. 392] "A A girl that lives in the apartment.

"Q What apartment does she live in?

"A I think it's 7.

[fol. 393] "Q All right, who's her boy friend?

"A She's got plenty of boy friends, I don't know.

"Q All right, how about Jesse?

"A Jesse goes around, yeah.

"Q What's his last name?

"A I don't know his last name.

"Q What's he look like?

"A I don't know. He's not heavy. I'd say he's kind of short, pop-eyes, kind of big eyes, I guess.

"Q Mustache?

"A Yeah, he have a mustache.

"Q Like yours?

"A No, it's heavier than mine.

"Q Is it trimmed or what?

"A Oh, I don't know.

"Q Was he with you that afternoon?

"A No, he wasn't.

"Q When is the last time you saw him?

"A I haven't seen Jesse in a couple of days.

"Q All right, what kind of car does Jesse drive?

"A I think a little Volkswagen.

"Q What kind of work does he do, do you know?

"A I really don't.

[fol. 394] "BY SGT. WHITE: Charley, you have any questions you want to ask him?

"BY SGT. VAUGHN: Q What was Jesse's last name?

"A I don't know his last name.

"BY SGT. WHITE: Q You know where he lives?

"A No, I don't.

"BY SGT. VAUGHN: Q Do you know what type of work he does?

"A I know he was working at one time. I think he was doing some galvanizing work.

"Q For who?

"A I don't remember. But he tried to get me to get him a job out there with me, but he wasn't hired.

"Q After you grabbed the revolver from this lady in the market, you ran directly to your car, is that correct?

"A Right.

"Q Approximately how far north of the market was your car parked?

"A Like I say, a couple of car lengths or so.

"Q On the east side of Holmes Avenue?

"A Mm-hmm.

"Q About how far north of your car was this
[fol. 395] Negro fellow and this white man when they turned around and came back to your car?

"A They was nearly by-passing it, and this other guy, you know—

"Q Pardon me?

"A They was almost past it and one guy, you know, just hollered something, I don't know. Anyway, they came back and got in my car and told me to move it.

"Q Now, was it the Negro fellow and the white fellow that were past your car?

"A I think so. I don't know. I wasn't paying too much attention.

"Q Approximately how far north of your vehicle were they?

"A I don't know, I wasn't paying that much attention, you know.

"Q Could you give me an approximate distance?

"A I'm afraid to say.

"Q Where was the other colored fellow standing at that time?

"A He wasn't standing. When he got in my car, all the rest of them got in there. That's all I have to say about that.

"Q After these fellows went southbound on this one street toward Florence Avenue, where did you
[fol. 396] go then?

"A I backed out and made a right and went back, zig-zagged and went across to Figueros and went up Figueros and went to Colden and parked my car in the back and went upstairs.

"Q Why did you do that?

"A I don't know. I didn't want to be caught with a gun around the place.

"Q What did you do with the gun then?

"A I took it home, and I thought I better leave it here—I better try to get rid of it. I put it in my car, took it out to the job and then, I don't know, something just kept telling me to get it out of the car and I did. I knew I would be followed because of my check and identification. I knew that.

"Q What did you do with the shells that were in the revolver?

"A I threw them away as soon as I got home.

"Q Where did you throw them?

"A I think it was the washermat building, laundromat on the corner.

"Q At the laundromat that was under construction?

"A Yes.

"Q Where is this located?

[fol. 397] "A Colden and Hoover.

"Q What side of the street?

"A The left side going north—north.

"Q How many shells did you throw away?

"A Five.

"Q Where was your vehicle at that time?

"A I was moving, I didn't stop.

"Q Were you traveling northbound or southbound?

"A I was going northbound—not northbound—west—west. West.

"Q West?

"A Uh-huh.

"Q Did you throw the shells out your left window or right window?

"A I throw them over like that and—

"Q What was the purpose of that?

"A I didn't want to be caught with a loaded gun. And, I don't know, I was scared. I mean, I really got scared after it happened, you know. I took it home. I tried to figure out where to put it. Couldn't figure

no place to put it and I thought, 'Well, I got to get it out of the house anyway.' So I put it in the car and went to work and worked for awhile. And it kept going through me. Bill, I told Bill about it, somebody
[fol. 398] held the liquor store up and he said, 'What happened?' and I told him, 'And I was in there.' 'So the man got shot.' I didn't know he died or anything. So he told me, he said, 'Look, Man, you better get rid of your guns.' So I went to the car and got it and put it in my pocket and put it back, and that's where you found it at; where I put it at. And I would have got rid of it if I had got off.

"Q What type of guns did these two colored men and this white man have in the liquor store?

"A I really don't know guns that well. But one of them was a great big gun. It wasn't a round barrel; it was kind of square, like three corners or something, you know.

"Q Was it a revolver or automatic pistol?

"A I really don't know. The only thing I saw was the shape then. It was square instead of round.

"Q Excuse me, the barrel was square or maybe had five corners rather than round?

"A It had corners; it wasn't round. I noticed that.

"Q About how long was this one gun?

"A Oh, about a feet, I guess, looked like. It looked very big to me.

"Q About a foot long, did you say?

[fol. 399] "A It looked something like that, you know, great big gun.

"Q All right, who had this big gun?

"A Oh, boy. I don't know. I really don't know. I just looked at the gun. I know it was a big gun with a square barrel. I know that. And when the man started hitting him and knocking him around, I tried to stay out of the way. This lady reached down to get her gun.

"Q Well, this other fellow who had a gun inside the liquor store itself. Who had the other gun?

"A I don't know. I mean, you know, I wasn't just there for an interview, you know. I just can't swear

to them, you know. I can't swear I'm giving it to you right no way.

"Q You say this fellow who had the gun was knocking the old man around. What do you mean by that?

"A He hit him in the head, I know that, because the man was falling on the floor.

[fol. 400] "Q What did this fellow hit the old man with?

"A Hit him with a gun.

"Q Do you know what part of the gun?

"A No, I don't.

"Q Do you know on what side of the head he was hit?

"A The man broke around the counter, like I said before.

"Q This was before he was shot?

"A Yes, that was before he was shot.

"Q He broke away and ran around the counter?

"A Mm-hmm.

"Q After the glass had been broken?

"A And he grabbed a wine bottle, and that's when the wine bottle started falling. And I'm pretty sure his glasses was off, I don't know.

"Q How did this wine bottle get broken?

"A He grabbed the wine bottle and evidently he dropped it or something. I know wine was all over the floor. I saw that.

"Q Did you see this old man who was shot hit anybody with a wine bottle?

"A No, I didn't. I didn't see the old man hit nobody. He hardly came from behind the counter.

[fol. 401] "He had a wine bottle, but I don't know if he dropped it. He didn't hit anybody, I'm pretty sure of that.

"Q And this gentleman that was shot, he was shot, he was shot while he was standing in the center portion of the store?

"A Somewhere coming out o the gate.

"Q And where was the man standing who shot him?

"A Behind me, like over here. Across my shoulder, like that way.

"Q That is, was he close to the front door?

"A No.

"Q Or close to the center portion?

"A Here's the diagram a little while ago.

"Q Well, excuse me, where was the person who shot the old man in relation to the cash register?

"A Let's see. The same one that shot him went to the cash register.

"Q The cash register—you are in the same position—you are at the cashier's table there. The cash register is in this position right here and you are looking in the identical same position now as if you would be in the store.

"A Mm-hmm.

[fol. 402] "Q Now, this fellow that shot the old man, where was he standing?

"A We was kind of behind me like. See, I'm standing like this and he was over this way and this other fellow hit him.

"Q Excuse me, you're talking a little bit too fast for me and the machine, I think. The fellow—

"That hit him with the gun—ran around and that's when he grabbed the wine bottles, and instead of coming through, I mean, bottles fall and everything, and this guy told him to stop or halt or something. And anyway, the man looked up and kind of looked at him, and the man shot him. As simple as that. I don't know what—

"Q The man that shot him, was he off to your left, back over into a portion of the delicatessen stand?

"A Yeah. I was by the counter, near the counter myself.

"Q The fellow, though, that shot the old gentleman, was he back over near the delicatessen stand, say six or ten yards from you, or was he standing directly behind you?

"A I don't know exactly what a delicatessen

[fol. 403] "stand is.

"Q It's in this position, to the east of the cash register.

"A This is the cash register here. I'm standing here.

"Q Facing north?

"A Yeah, I'm looking straight across to the lady, talking to her, and this guy—when the guy got shot, she was still standing behind the thing here.

"And this guy ran around through, like I said, and he came back out. And this guy was behind me. And somehow or other he shot the guy behind me, I don't know. I heard something fire and I looked back—

"Q Just a minute. You said he ran on around through here. You are talking about—did he, the old man who got shot, did he run anybody around?

"A Almost, like I say—

"Q Who ran who around what?

"A This other guy hit him with a gun, or something like a glass, or something.

"Q Did you see him do that?

"A No, I didn't see him, or anything like that. I heard something fall and looked.

[fol. 404] "Q Where was he pushing the old man with a gun?

"A He headed him towards the back.

"Q What part of the body was this person shoving the gun?

"A I really don't know, you know. I can't be exact about these things, you know.

"Now, like I say, he came around and the man got shot. I told you that 50 times.

"Q Came around through what?

"A The cash stand, or the bar thing, whatever it is.

"Q The delicatessen, some type of display counter where the food is?

"A Yes, he went around there and he went around and he came through and that's where the man shot him.

"Q Say this is a display case, this portion here. Was it—here's two display cases. This one here

on the west side is where the cash register is, and this is another display case here on the east side, where, actually—

"Q Okay, we'll say that.

"It's refrigerated. Was the old man shot on the south side of these display cases or was he shot on the north side of the display cases between the

[fol. 405] "delicatessen and the north wall.

"A He was, like you say, this is the back of it?

"Q Yes.

"A He came around, through here. The man was shot right out here.

"Q You are indicating that he was shot—

"A Coming through that gate.

"Q Coming through the portion between the delicatessen stand—

"A And the cash register.

"Q And the cash register area, more or less in the center of the store?

"A You can say that if you want to, but he was on this side, I know that.

"Q How do you know he was shot?

"A I saw blood coming from him as he was coming down.

"Q Did you hear a noise similar to a gunshot?

"A Sure did, and saw blue smoke, too.

"Q And where was this man at that time, when you saw the blue smoke?

"A He was just about past me. And he was almost going up to the guy, and the guy went on down like he was shot in here somewhere, I don't know.

[fol. 406] "Q Where was the blue smoke at that time?

"A When I turned my head, I saw it. I don't know exactly where it was at.

"Q Would it have been in the center of the store?

"A Like I say, I'm standing here. The man shot from over here somewhere.

"Q What did you do at that time, that very moment that you heard a gun go off?

"A I looked around and this guy was still, you

know, waving a gun. So this girl pulled a gun and this other guy grabbed her and pulled her back.

"Q You say a girl pulled a gun?

"A Yes, the lady.

"Q You are referring to the lady behind the cash register?

"A Yes.

"Q You said a guy grabbed her and pulled her back?

"A The guy who was working with her back there.

"Q What was he, a white man?

"A He was a white man.

"Q He pulled her back?

"A He tried to keep her from getting the gun. So I took the gun out of her hand, because the guy

[fol. 407] "would have shot the woman; I know he would have.

"Q You say the guy would have shot the woman?

"A Sure. He wouldn't take no chances.

"Q What guy are you referring to?

"A I don't know.

"Q The guy, white man, or the man behind the counter?

"A I think it was a colored guy that shot him.

[fol. 408] "Q Now, you say he would have shot her. Who are you referring to when you make that statement?

"A The one that shot the old man.

"Q Would have shot the woman?

"A I believe he would have.

"Q Who else was standing here at the immediate vicinity of the cash register at the time the old man was shot?

"A I don't know.

"Q Was there somebody else standing there with you?

"A I don't remember anybody standing there with me.

"Q Do you recall somebody standing back of you, closer to the door?

"A Well, there was two, the white and the colored guy was back behind me because one went back after the old man, like I said, and run him behind the counter and I think it was the tall one that shot —I can't be sure, but I think the tall guy shot him.

"Q When you jumped in your car, where was the gun that you took from the lady?

"A In my hip pocket. I forgot all about it.

"Q When you jumped in the car, were you keys still in the ignition?

[fol. 409] "A No, I had my keys in my pocket.

"Q When you jumped in the car these other fellows jumped in, what did they say to you?

"A They said, 'Let's get out of here, let's move.'

"Q Why did you move?

"A Look, I'm no hero. I want to live a little while. So you got a gun and you say do something, I'm going to do it.

"Q What were they going with the guns?

"A Pardon?

"Q What were they doing with the guns?

"A They were in their hands, I know that, looking back and just telling me to make it, make it, make it. And they said, 'Run this light,' so I ran right through it.

"BY SGT. VAUGHN: I have nothing else, Sergeant White.

"BY SGT. WHITE: Q All right, after you left these three men out and they got in the green car and left, you went on a zig-zag route home, right?

"A Right.

"Q You still had this gun that you took from the lady in your pocket?

"A I laid it in the seat of the car because it was, you know, kind of tight and I laid it in the [fol. 410] seat of the car. And when I went zig-zagging, like I said, home, I got home, I took it out of the car and took it upstairs. And I looked at it and thought about what I'd do with it. I was scared so I said, 'I'm going to get rid of the gun,' you know.

"Q You took the gun up to the house with you?

"A Mm-hmm.
"Q Did you change clothes?
"A Just sweater and hat.
"Q Just sweater and your hat?
"A Yes.
"Q And how long did you stay at home?
"A Oh, about half an hour, forty-five minutes, I guess.
"Q And your daughter came home?
"A Yes, she came home at twenty after 3:00.
"Q And where did you go when you left home?
"A I left home and went to work at—I had to be at work at 4:00 o'clock.
"Q Did you get to work on time?
"A Yes.
"Q And did you take the gun with you?
"A Yes, I did.
"Q Where did you carry it?
"A In the glove compartment.
[fol. 411] "Q And when you got to work, where did you park the car?
"A Same place you pulled it, right—
"Q Right by the gate?
"A That's right.
"Q And you left the gun in the glove compartment?
"A And it just kept getting at me and I went and got it out.
"Q What did you do with it?
"A Took it back in the back.
"Q What is this area where you took it?
"A Shipping and receiving.
"Q In the shipping and receiving department? Now, this is the area that you directed Sergeant Vaughn and myself to earlier this evening?
"A Right.
"Q Where we found this gun sitting on a pallet?
"A Right.
"Q In the corner of the shipping and receiving building, right?
"A Right.

"Q And that was the gun you took from this lady in the liquor store?

"A Right.

[fol. 412] "Q What time did you say you picked your check up today?

"A 10:00, 10:30, something like that.

"Q And where did you go between 10:00 or 10:30 and 2:00 o'clock?

"A Oh, I went home, drank some beer, drank some liquor, I mean, you know.

"Q Are there any banks near your home?

"A I think there is one on Manchester and Figueroa, I think.

"Q Is there any bank between where you work and your home?

"A Sure, I guess it is. But I can't say exactly where they at, you know. I never cash my checks at a bank. Most of the time at Vernon and Long Beach.

"Q Now, this check was $89?

"A Eighty-one cents.

[fol. 413] "Q That's for what? A week's sick leave?

"A A week's sick pay, yeah.

"Q And you never cash them in a bank? Always go to a liquor store?

"A I never cash a check in a bank.

"Q And you have cashed checks at this particular liquor store before?

"A Yes.

"Q And did this lady you took the gun from ever cash a check for you?

"A I really don't know. I know the man did though, the man that got shot, the old man. I think maybe she did, too, I don't know. I mean, I don't remember things like that.

"Q Is there any particular reason you go to this particular liquor store?

"A The one today?

"Q Mm-hmm.

"A No, there really isn't.

"Q Well, this is on Holmes Avenue and this is quite a ways east of your home and quite a ways south of where you work.

"A Right.

"Q How do you go to work when you go to work?

"A I go—some times I go the freeway to Vernon,

[fol. 414] "I either go freeway to Slauson, Florence, then go out Holmes, straight across Holmes, you know.

"Q Where were you intending to go after you got your check cashed?

"A Well, no place in particular. I mean, I had some money. See, I was in an accident and got a little piece of money out of that. So I just wasn't, you know, heading any place in particular. But I decided to stop. I was running out of drinks and I decided I wanted something to drink.

"Q Were you on your way to work?

"A No, I wasn't. Like I say, I was down to the doctor's office. That's aon 56th and, you know, went straight on across—

"Q 56th and Broadway.

"A Right. Right.

"Q And you came east, over to Holmes, on what street from Broadway?

"A I think I went out 54th or 55th; 54th, I believe, and went up—I stopped at a liquor store on—is it 54th and Avalon? Anyway, they wouldn't cash it and I remember I had cashed a check at this place before, and I didn't have nothing to do, so I just went there.

"Q Any banks on the way from the doctor's

[fol. 415] "office?

"A Like I say, I never need that well.

"Q What other liquor stores have you cashed checks at?

"A Like I say, the main one is on Vernon and Long Beach.

"Q At this time you come from 54th and Broadway, or 56th and Broadway, over to the 6100 block of Holmes?

"A Mm-hmm.

"Q Which is probably a couple or three miles east of Broadway, would you say? A couple of miles maybe?

"A Could be, I don't know.

"Q And 20 or 30 blocks south of—or maybe 15 or 20 blocks south of this, and then you went to Holmes, is that right?

"A Went to Holmes, right.

"Q From there you went on home?

"A You mean after I left the liquor store?

"Q After you left your men off and left the liquor store? Is this a usual route for you to take?

"A Holmes Avenue?

"Q Yes.

"A Yes. Most of the time. I take Holmes quite
[fol. 416] "a bit. If I don't take the freeway then I go out Florence and take Holmes—a pretty straight shot. Like I say, I stopped there and cashed my check.

"Q How did you go to work today?

"A I drove my car.

"Q What route did you take?

"A Slauson. I left home and went on across, right on 56th, went to Alameda, turned left and went down to work, and parked my car right in front of the building.

"Q How did you get to Slauson?

"A I think I went up Hoover, I believe.

"Q Didn't go the freeway this time?

"A No, didn't go the freeway.

"Q After you left this liquor store, did you ever drive back by there today?

"A No, I didn't.

"Q Any particular reason?

"A Yeah, plenty reason. Yeah. Some man got shot, I mean.

"Q I'm going to ask you this now, Gilbert, you witnessed a shooting in a liquor store.

"A Right.

"Q And you took the gun from the lady's hand.

"A Yes.

[fol. 417] "Q Who operated the liquor store, or worked in the liquor store?

"A Yes.

"Q And while you were there three men came in—a short, colored one and a tall, colored one and a white guy. How tall was this white guy, by the way? As tall as you are?

"A I don't—he's quite—I don't think so:

"Q All right, is he Caucasian all the way or does he have some colored blood in him?

"A I would say he's Caucasian all the way.

"Q All right, now, you've witnessed all this; you saw all this; and drove these man away from the location. Did it ever occur once to you to call the Police Department or the Sheriff's Department?

"A I've thought about it. I mean, after, you know, I thought about my check I—that's the reason I wasn't trying to duck or hide anything. I went to lunch and came right back into your hands. I knew that before.

"Q Why didn't you walk up and say this?

"A I don't know. I just—I don't know.

"Q Now, I want to ask you this. I want to ask you, and I'd like to have a straight answer, did you [fol. 418] and three other persons, two colored and one Caucasian conspire today to rob the liquor store at 6126 Holmes Avenue?

"A No.

"Q Did you or did you not?

"A No, I wasn't in there. There was an attempted robbery. I don't know whether they got anything or not, I don't know.

"Q Do you know any of these other three persons that participated in the robbery?

"A No.

"Q Have you ever seen them before?

"A No, I didn't.

"Q Would you know them if you saw them before?

"A I think so.

"Q This statement was given by you to us freely and voluntarily?

"A Yes, I did.

"Q After having been advised of your constitutional rights?

"A Right.

"Q Has everything you have told us been the truth to the best of your knowledge?

"A Yes, it has.

"Q Have any threats of force or fear or threats of violence been used upon you to get you to make

[fol. 419] these statements?

"A No.

"Q It is of your own free will?

"A Yes.

"BY SGT. WHITE: All right, let's close at 1:45 a.m."

THE COURT: Thank you, sir, you may step down. We will recess until 1:45.

(Whereupon, a recess was taken until 1:45 p.m. of the same date.)

[fol. 420] LOS ANGELES, CALIFORNIA
WEDNESDAY, JUNE 23, 1965 2:00 PM

(The following proceedings were had in open court without the presence of the jury:)

THE COURT: Mr. Walton, do you have a motion to make outside the presence of the jury?

MR. WALTON: Yes, your Honor.

THE COURT: The record may indicate defendants and each of them are present.

Go ahead.

MR. WALTON: The statements, if read into the record in their entirety—and that apparently was your Honor's last position—I feel have the effect of putting me into the position where I would have to be asking for a mistrial.

Now, I've gone through the statements again during this last noon hour with an eye to your Honor's last

ruling. And I have made notes here of 17 or 18 specific instances of these statements where I feel portions of them must be stricken in any event, for this reason; they do not incriminate the speaking defendant. They are not necessary to the continuity of the statement. All they do is reach out and in some way bring my Defendant Harrington within the scope of the statement when they are in no wise admissible to guilt or innocence.

I might cite your Honor the case of Kramer vs. the [fol. 421] United States, 317 Federal 2d 114. It's a 1963 Circuit Court of Appeals case. I don't have it here, but I can get it during the recess, where there was exactly that problem.

There a conviction was reversed because in the course of admitting a statement, even though the proper limitations were given to the jury, portions of that statement had nothing to do with the defendant who supposedly gave the statement to the testifying officers.

And it only affected the co-defendant and did not affect the continuity of the statement, and were easily severable from it.

Now, just to cite to your Honor two examples—and these are the extreme examples—I don't mean to say that these statements are replete with this, but to show your Honor the kind of problem that we have, I cite now from the statement of George Rhone, page 17, beginning at line 25, and going over to line 3 on page 18.

"Q Did Glen tell you anything as to where he had been the last year or so?

"A I understood that he had been in Quentin and that he had escaped. That's what he told me.

"Q Who told you this?

"A Glen.

"Q Glen told you this?

[fol. 422] "A Yeah."

If that goes in, I have to ask for a mistrial.

Take Bosby's statement, which I understand is coming up very shortly here—

MR. WARNBERG: Well, for the record—

THE COURT: I do recall when we were in chambers

yesterday there was a question like that asked of Harrington, and I said if that statement were read even in its entirely, that it would have to be stricken.

The statement such as you have read there has got nothing to do with the robbery at all, nothing to do with the defendants' implication in the robbery. It would have to go out.

MR. WALTON: Well—

THE COURT: Well, just a moment, Mr. Walton. If you make an objection to a specific sentence or paragraph or series of sentences or paragraphs or statements because of that, and point them out in advance, I will rule on them.

Now, the one you pointed out to me obviously your motion will be well taken, that statement should not be included.

[fol. 423] MR. WALTON: Does your Honor desire that we proceed with page and line references right now, because I have them right here before me.

THE COURT: I certainly do. That is the only way I can rule on them.

Will you take notes of these, Mr. Warnberg?

MR. WARNBERG: Yes, your Honor. As a matter of fact, I have already—I might help counsel out on the very first page of George Rhone's statement, line 23; we have stricken the reference to the Sheriff's Department photograph.

MR. WALTON: Well, I have that in one of the other aspects.

THE COURT: Let's take them up as he presents, Mr. Warnberg, and I will rule on them and then there will be no misunderstanding.

MR. WALTON: Which statement does your Honor have before you?

THE COURT: I have all of them, sir.

MR. WALTON: We will take the Rhone statement first.

THE COURT: All right.

MR. WALTON: Page 1, lines 23 through page 2, line 2.

THE COURT: Well, as far as line 23 is concerned, the portion of line 23 which says, "Bearing the L. A.

County Sheriff's Booking No. 020163, dated 10/15/63," will be stricken. The rest of the question will remain.

MR. WALTON: Page 2, lines 1 and 2.

[fol. 424] THE COURT: Well, what connection does the name "James Larson" have with this case, Mr. Warnberg?

MR. WARNBERG: The car was registered in that name, your Honor.

THE COURT: One of the cars that was at the market? That is how the officer when he checked the license number, the male Caucasian who he says it was listed under, that was the name of James Larson?

MR. WARNBERG: The car under which that was taken at the time of Rhone's arrest was under the name of James Larson. It was an alias name, but we contend it was brought out not only there but under also Harrington's registration at a motel, where he was later arrested.

THE COURT: Will there be any independent evidence of this?

MR. WARNBERG: I believe, your Honor, we will accede to striking lines 1 and 2.

THE COURT: All right, lines 1 and 2 on page 2 will be stricken.

MR. WALTON: Page 4, lines 16 and 18—wait a minute, your Honor, sorry—page 4, lines 6 through 18.

THE COURT: That is denied. It is certainly all connected with the commission, this place and what he was doing in the robbery and they are all tied up together and it is not extraneous at all.

Now, the next one.

[fol. 425] MR. WALTON: Page 5. Wait a minute, I am sorry, I think I made—I was looking at page 4 a moment ago; that was my problem.

May we go back to page 4, your Honor?

THE COURT: All right.

MR. WALTON: Lines 16 through 18 at page 4, two questions, two answers.

THE COURT: Denied.

MR. WALTON: Now, page 5, lines 6 and 7, 11 and 14, 16 and 17.

THE COURT: 6 and 7, you say, first?

MR. WALTON: Yes, "And where did Glen get his piece of artillery?

"A I don't know."

THE COURT: That is denied, also.

MR. WALTON: Then lines 11 through 14:

"Q What was said by whom? In substance, that is?"

And the answer to that question.

THE COURT: That is denied, also.

MR. WALTON: 16 and 17.

THE COURT: That is denied, also.

MR. WALTON: Page 10, lines 12 through 16, or 15, three questions and answers.

THE COURT: That is denied.

MR. WALTON: Page 13, question and answer be-
[fol. 426] ginning on line 15.

THE COURT: Denied.

MR. WALTON: Page 14, question and answer beginning on line 7.

THE COURT: Denied.

MR. WALTON: Page 17, beginning on line 16, continuing on over to page 18 through line 5.

THE COURT: Well, 16 and 17 stay in; denied as to those, but as to line 20 on page 17, 20 through 26, will be stricken. They deal with whether he ever had the gun in his possession at prior times and whether he had been to San Quentin, and so forth, and those are extraneous, and those will be stricken.

MR. WALTON: 1 through 5 on page 18.

THE COURT: Same category, they will be stricken.

MR. WALTON: Also page 18, lines 17 through 26.

THE COURT: Denied; that deals with what happened at the market.

MR. WALTON: Page 19, lines 10 through 20.

THE COURT: Denied.

[fol. 427] MR. WALTON: Now, on Bosby's statement, page 19, beginning at line 17, continuing over through line 2 on page 20. The effect of that is portraying Harrington as the white guy with the contention here of his being some sort of a pretty evil character.

THE COURT: Well, it is all tied in with the alleged conspiracy to rob the place. It will be denied.

Next, please.

MR. WALTON: That's all for that statement.

THE COURT: All right.

MR. WALTON: Cooper's, which has been read, motion to strike page 21, beginning at line 9 through line 6 on page 22.

THE COURT: It is denied.

MR. WALTON: Page 25, lines 7 through 16. Now, that might not appear to be directly culpatory of the Defendant Harrington, except when considered in context with the prior section that I asked to have stricken.

It is assumed that the white guy had a gun after the testimony on page 21, which your Honor is leaving in.

Now, this portion of Cooper's statement on page 25 might be subject to the construction that it was the white fellow who did all of these things, who would have shot the woman, which is speculative, at best, even on Cooper's part.

[fol. 428] THE COURT: I don't think it could, possibly, because it states that the colored guy was the one who shot him. I'm not going to debate it with you. I will just deny it.

MR. WALTON: Page 30, lines 2 through 6 and 12 through 16.

THE COURT: Page 30, what lines, please?

MR. WALTON: 2 through 6.

THE COURT: Denied.

MR. WALTON: Lines 12 through 16.

THE COURT: Denied.

Is that the end of it?

MR. WALTON: That's all that I have.

THE COURT: Bring the jury in, please.

(The following proceedings were had in open court in the presence of the jury:)

THE COURT: You may proceed, Mr. Warnberg.

MR. WARNBERG: Thank you.

Officer Vaughn, will you resume the stand.

CHARLES WILLIAM VAUGHN,

called as a witness by and on behalf of the People, having been previously duly sworn, resumed the stand and testified further as follows:

THE CLERK: The witness is still under oath. Will you state your name for the record, please.

THE WITNESS: Charles Willam Vaughn.

[fol. 429]

DIRECT EXAMINATION (Continued)

BY MR. WARNBERG:

Q All right. Now, Mr. Vaughn, you then completed, shall we call it, the formal statement with Defendant Cooper.

A Yes, sir, that is correct.

Q And you completed that statement approximately what time on December the 12th?

A December 12th, 1964; I believe it was 1:25 a.m.

Q All right. Now, what was your next investigation?

A At the vicinity of the arrest of the Defendant, Mr. Bosby, in the Firestone District, on December the 12th, 1964, at approximately 1:50 p.m.

Q Who did you see there?

A Mr. Bosby, the preceding witness, Deputy Anderson, Bennett, several other uniformed officers, and several other detectives.

Q All right. What did you do there?

A We took Mr. Bosby in custody at that time and had a brief conversation with him.

Q What was that conversation?

A We informed Mr. Bosby that he was under arrest on the charge of murder, and that he was not required to give us a statement in this case, and any statement he did give us would probably be used in court against him, [fol. 430] and he had a right to contact his attorney and remain silent.

Q Then what did you say?

A We asked Mr. Bosby, in substance, where the gun was. That was—I believe we referred to it as a gun

that was used in the market, I don't recall. But there was a conversation that pertained to the gun.

Mr. Bosby stated that he had met these two other individuals Friday night, I believe he referred to it as down Wilmington Avenue, and that the gun that was used to shoot the old man was thrown out of the car window on 115th Street as they were driving, I believe, from Wilmington Avenue westbound to Compton Avenue.

We then proceeded with Mr. Bosby to the street he directed us to, which was 115th Street, in the vicinity at 1557 East 115th Street.

At that location Mr. Bosby informed us that this is the approximate position that the gun had been thrown out of the window.

We searched the premises in the presence of Mr. Bosby and failed to locate any firearm.

We had a conversation with numerous persons in that neighborhood pertaining to this, also.

Q Did you find the gun?

A No, sir, we did not.

Q All right. So what did you do?

[fol. 431] A We returned Mr. Bosby to the Firestone Station where he was booked on a charge of murder.

Q All right. Then your next investigation was what?

A Then we took a formal statement from Mr. Bosby at Firestone Station.

Q And that was on what date and time?

A That would be at Firestone Station the afternoon hours of December the 12th, 1964, approximately 6:12 p.m.

Q And was this also a recorded statement by a stenographic reporter?

A Yes, sir, it was.

Q Who else was present at the time?

A Sergeant Harold White, I believe Sergeant Gerald Rowley was present from the Firestone Station Detective Bureau, and Mr. Bosby and myself, and the statement reporter. I believe it was Harold St. Thomas.

[fol. 432] Q Did Mr. Bosby, Defendant Bosby, at all times speak free and voluntarily?

A Yes, sir, he did.

Q Let me show you a statement, it is a document of 33 pages, headed: "Statement of Jesse Bosby."

I will ask you if you are familiar with that typewritten statement?

A Yes, sir, I am.

Q Does that statement fairly and accurately reflect the conversation you had with the defendant Bosby at that time?

A Yes, sir, it does.

Q Is it necessary for you to read the statement to give it verbatim?

A Yes, sir, it is.

Q Would you read the statement?

A (Reading:)

"Statement of Jesse Bosby taken at 6:00 p.m."—

THE COURT: Excuse me, sir.

Ladies and gentlemen, I want to admonish you again that since this is an extrajudicial statement, that is, one made out of court, it will be received by you as evidence only as against the defendant Bosby and against no other defendant, received only for that limited purpose.

Thank you. I am sorry to interrupt you, sir.

Proceed.

[fol. 433] THE WITNESS: (Reading:) "Statement of Jesse Bosby taken at 6:00 p.m. on Saturday, December the 12th, 1964, at the Los Angeles County Sheriff's Firestone Station, located at 7901 South Compton Avenue, Los Angeles, California, in the presence of Sergeant C. W. Vaughn and Sergeant H. W. White of the Los Angeles County Sheriff's Department, Detective Bureau, and Sergeant G. Rowley of the Los Angeles County Sheriff's Firestone Station Detective Bureau.

"This statement obtained from above witness during investigation of the crime of robbery-murder, under file No. Y 083 460.

"Reported by: Harold St. Thomas, stenographic reporter, Los Angeles County Sheriff's Department, Detective Bureau.

"BY SGT. VAUGHN: Q Mr. Bosby, we have previously informed you of your rights, you do not have to converse with us or give us any statements regarding this case, and you have a right to counsel, whom you have previously called, who is Mr. Earl Brody. You did make your phone call, is that correct, and converse with your attorney?

"A Yes. He told me to wait until he spoke with me; that I would probably go to the County jail tonight, but that I would still be able to converse with you.

[fol. 434] "Q Officers?

"A Yes, that's what he told me.

"Q All right. Now, at this time we'd like to know if you are still willing to converse with us?

"A (No answer.)

"Q Would you state your full name, please?

"A My full name is Jesse Bosby.

"Q How old are you, Mr. Bosby?

"A Thirty.

"Q And what is your home address?

"A 2258 East 97th Street.

"Q Is that in Los Angeles?

"A Yes, sir, Zone—I don't know if it's 2, I think it's 2.

"Q Are you acquainted with a person known as Gilbert Cooper?

"A Yes, sir.

"Q How long have you known Mr. Cooper?

"A It must have been something about—say about nine months or more, something like that.

"Q Can you talk just a little louder—

"A I think it's about nine months or more.

"Q Did you and Mr. Cooper meet some place yesterday with two other persons?

"A When he and I met, he was alone and I was alone.

[fol. 435] "Q What time was this yesterday?

"A Oh, about 9:30, 10:00, something like that yesterday morning.

"Q And where was this located?

"A An Slauson, about a block this side of Alameda, about a block and a half.

"Q That would be west of Alameda?

"A West.

"Q And prior to that time did you meet Mr. Gilbert Cooper at his home or at your girl friend's home on West Colden Avenue in West Los Angeles?

"A No, at his home, yes.

"Q Was there some conversation between you and Cooper at that time about possibly going into a market or robbing a place here in Los Angeles?

"A No. The only thing that we had in mind—the only thing that we talked about was that one place over there. That's all, and we talked about that, yes.

"Q That is, you talked about one little market or liquor store—

"A No, it's a market. Well, it's a market and liquor store.

"Q And what were you and Cooper going to do in this market?

"A Well, we were going in to get the money.

[fol. 436] "Q And how were you going to get the money from the market?

"A You mean what—

"Q Were you planning on going in and taking the money from the people?

"A Yes.

"Q Did you know the approximate location of this market before going to it?

"A Yes, I had to cash checks there before. I worked about five blocks from it at one time, at Emsco Galvanizing, which was '64, about, yes, '64. From about September of '63 until about January of '64.

"Q Approximately where is this market located?

"A I think it's on Sixty-some Street. It's not too far from Gage.

"(Sgt. Rowley left the room)

"Q Would that be in the vicinity of 6126 Holmes Avenue?

"A Yes, I believe it would be.

"Q Is that a little white, wooden market that sits on the corner on the right-hand side, going north?

"(Sgt. Rowley returns:)

"A Going north on Holmes Avenue, yes, sir.

[fol. 437] "Q And prior to yesterday morning, did you and Gilbert Cooper have some additional conversation about going into this market?

"A Yes, we talked about that before. But this came up, like—this came like I said, this came on the spur of the moment—long time and all that. I mean, it was about three weeks, I say, we was talking about it before.

"Q Did you and Cooper have plans on having anybody else on this job with you?

"A No, sir, because we didn't know definitely whether we was going to do it ourselves.

"Q Yesterday afternoon did you and Cooper meet some other persons in the vicinity of the market regarding knocking over this market?

"A In regarding to knocking over the market?

"Q Yes.

"A You mean meeting anyone else in the vicinity of the market?

"Q Yes.

"A No, sir.

"Q Did you meet two other persons yesterday, a male Negro and a male white, and did these other two persons go with you and Cooper within a couple of blocks of the market?

[fol. 438] "A Yes, sir.

"Q And prior to going into the market, did all four of you have kind of conversation about going into the market?

"A Yes, sir, I think so.

"Q Do you recall what the agreement was between the four of you regarding this?

"A Sir, there was no agreement actually made. It was that one of us was going to go in and then

the next one was going to go in and the others were coming in, and that was it. We had talked previously, I guess, but not at the store.

"Q What was your—what were you supposed to do regarding this case.

"(Sgt. White left the room.)

"Q Were you going in first, second, third or fourth?

"A First or second.

"Q What were you to do when you went inside the market?

"A To cash a check, go to the liquor box and come back and cash a check.

"Q And what were the other persons to do when they went in?

"A They were supposed to see that everything would be okay when we cashed the checks, when the [fol. 439] "cash drawer was opened and the checks would be cashed.

"Q Then with the cash drawer open, what were all of you to do at that time?

"A Well, everybody—I'm going to be the one, you understand, reach in and get the money.

"Q That was your job? To reach in the cash drawer and get the money?

"A Yes, sir. It was not—was you say—yes, it would be a cash drawer.

"Q It's a portion of the cash register? Or close to it?

"A Well, the cash register was here and it was down here.

"Q You were the man that was supposed to go in and get the money?

"A I was supposed to be the one that was supposed to make her get the money. That was the way it was supposed to be.

"Q And what were these other three persons supposed to be doing at that time?

"A Just seeing that everything was okay.

"Q Now exactly what happened when you went inside the market?

"A Well, I went to the box.

"Q Which box are you referring to?

[fol. 440] "A To the beer box.

"Q The beer box?

"A Yes, sir.

[fol. 441] "Q Go ahead.

"A And I asked him, did he have any small bottles of cold Kalani wine.

"Q And who were you talking to at that time?

"A The gentleman behind the counter.

"Q And how old a man was this?

"A About thirty something, I suppose, I presume.

"Q Would he have been older or younger than thirty?

"A I couldn't—I wouldn't say, sir, but I—I wouldn't say, sir.

"Q Was he an Oriental or a Caucasian?

"A Caucasian, I presume; I don't know.

"Q Now, what was the conversation you had with this gentleman?

"A He just told me—he said, yes, he did. He told me, no, he didn't have it. 'We don't have any large,' and I said, 'Well, thank you very much,' and I got beer.

"Q Where was Gilbert Cooper standing at that time?

"A I don't know. All I know, they were in the store at this time.

"Q That is, Gilbert Cooper and the other two persons were in the store?

[fol. 442] "A Yes, sir.

"Q All right, what happened after you had this conversation about the wine and the beer?

"A Gilbert—oh, yes, pardon me. Gilbert came in and I hadn't came back from the box, and he asked him about cashing a check for him, I think.

So he went back outside to his car to get the check, or something like that, I think. Because I know he didn't even come back in.

"Q You were in the store at that time, when Cooper left and came back in with his check?

"A I know he came back in, because when I turned around and walked back from the box, I saw him, too, and with the other two fellows in the liquor store at that time who were involved in this.

I am not for sure, sir, I am not for sure, but I know, as I am approaching, coming back this way, everybody was in there. But when I turned around to come back, I saw Gilbert coming back through the door.

"Q What happened when you had the conversation about the wine?

"A Let's see.

"Q Did someone ask you some questions about that time?

"A I think the gentleman in the store, I mean [fol. 443] the proprietor of the store, told me—oh, the whole ruckus had started then. No one—what did he do, this was told to me, that 'You're with them.'

"Q This is what the proprietor told you?

"A I think he was the proprietor.

"Q You say a ruckus had started by then. What do you mean?

"A I don't mean. I mean everybody was all shook up and everything, you know, and when I looked up and when I was walking back up that way, on my way back this way, and he came in between some—

"Q You're talking about the gentleman you talked to regarding the wine?

"A No, sir, the elderly man.

"Q The older man?

"A Yes, sir.

"Q And where was he walking?

"A First he was outside in the store, outside in the store. I guess he was putting up some canned foods or something like that and was going back through behind the counter, I presume.

"Q And where were the other two people that were working in the store? Where were they at that time?

"A I think they were behind the counter.

[fol. 444] "Q By the cash register?

"A The lady was, I think.

"Q Do you know where the gentleman was?

"A No, sir, I don't recall.

"Q All right. Where were Gilbert Cooper and the other two fellows at this time?

"A Well, they were standing right in front of me, just in front of the little counter.

"Q Was Cooper attempting to cash a check at that time?

"A This I couldn't say, sir. I don't—was he trying to cash his check then or what?

"Q Did you see Cooper have a check in his hand or did you see Cooper with a check at that time?

"A No, sir, I didn't notice, I didn't notice a check.

"Q Did you get into an argument or fight with this older gentleman there in the market?

"A Well, we got into an argument. We didn't fight.

"Q Tell me exactly what happened.

"A Well, he grabbed—he looked and saw what was going on up front and he grabbed a can of tomatoes and—a large can of tomatoes—and threw it at me.

So when he threw it at me, he ran around, he turned around right quick and ran back around, all [fol. 445] the way around the store, and come behind the counter this way.

"Q Behind the delicatessen counter?

"A I presume, sir.

[fol. 446] "Q Directing your attention to a diagram we have drawn here, here is the delicatessen counter on the northwest counter of the market. You say the gentleman ran around the east and north portion of the delicatessen stand and came back through the aisle between the delicatessen and the cash register and he was in the center aisle here?

"A He came back around this way.

"Q That is, through the back or north side of the delicatessen?

"A Yes, sir.

"Q Where was he standing when he threw this can at you?

"A Along here.

"Q That is, in the center portion of the store?

"A Yes, sir.

"Q And where were you standing at that time?

"A About here.

"Q You were also standing near the center portion of the store?

"A Yes, sir, on my way back up to the front—

"Q Front?

[fol. 447] "A Yes, sir, to the counter.

"Q All right, did something—what happened after he threw the can at you?

"A He ran.

"Q Which way did he run?

"A Back around this way and back around.

"Q Back to the south and to the east and back north and back around west and behind the delicatessen counter?

"A Yes, sir.

"Q All right. What happened at that time?

"A Then I heard the pop.

"Q You heard a pop?

"A Yes, sir.

"Q What did this exactly sound like?

"A Well, it sounded as if like a tire blew out or something.

"Q All right. Where was the old gentleman standing when this pop went off?

"A Well, he was along here some place, because he rested here and got a bottle. He wasn't too far from in here.

"Q Excuse me, He wasn't too far from the west end of the delicatessen counter?

"A No, sir, I don't think so. I don't know for sure, sir, but he came out here.

[fol. 448] "Q Was he facing towards the door when this pop went off?

"A Yes, sir.

"Q And his back was to the east?

"A Yes, sir.

"Q All right. Where were you standing at this time?

"A Over here on this side.

"Q You were standing on the south side of the delicatessen counter and to the east, or in the eastern portion of the store?

"A Well, I'm not too sure about my being in the east or up this way, because I didn't actually try to follow him. I was alone in there."

MR. GORDON: Just a moment.

THE COURT: Just a moment. Read that again, please, sir, that last.

THE WITNESS: (Continuing reading:)

"I was along in here.

"Q But you were in the vicinity of the front portion of the delicatessen counter?

"A Yes, sir.

"Q About how far in feet were you from the older gentleman when the pop went off?

"A Oh, about, I guess across—

"Q From here to the door?

[fol. 449] "A Yes, sir.

"Q Estimating approximately six to eight feet?

"A Well, I imagine so.

"Q All right. Now, at the time this pop or gun shot went off, where was Gilbert Cooper and the other two persons in relation to the cash register?

"A I think they were right here. Oh, yes, they were right here by it because when he came around—

"Q That is, you are indicating on the chart I have in front of me all three of them were standing directly south of the cash register, or the check-stand?

"A Yes, sir.

"Q All right. What happened then?

"A I—

"Q After the shot went off?

"A Well, he ran around here, and I don't know if one of the fellows just pushed him or what, but any way he turned around and he went back behind there.

"Q That is, he went—

"After the shot went off, he walked around between the check cashing stand and the delicatessen
[fol. 450] "stand and walked south into the center portion of the store?

"A Just about the center portion.

"Q Then he walked behind the delicatessen stand, and did you see the gentleman fall at that time?

"A No, sir, I didn't see him fall, period.

"Q Well, what did the lady and gentleman do that were behind the cash register at that time?

"A I don't know, because I didn't see them. I didn't see them.

"Q Did you see what happened to them after that?

"A No, sir.

"Q After the shot?

"A No, sir.

"Q Did you yell for them to go out the front door or out the back door?

"A I didn't yell anything.

"Q Did you hear any of the other three persons, Gilbert Cooper or the other two persons, yell anything to these two people behind the cash register?

"A No, sir, I did not.

"Q Where was the old gentleman standing or lying the last time you saw him?

[fol. 451] "A Standing—was in here.

"Q Standing in here?

"A Yes, sir. I didn't—

"Q That is, in the center portion of the store?

"A The center portion of the store, and he walked back behind the counter and everybody got so hysterical, I presume, but I didn't see the lady or the other gentleman.

"Q All right. Now, did you see this lady have any type of hand-gun in her hand at this time?

"A No, sir.

"Q Did you see Gilbert Cooper or either of the other two companions have a gun in their hand at any time while they were in the store?

"A I saw artillery, but who had it—who had it at the time I saw—because I presumedly admit I was hysterical, too, and I wanted to get out.

"Q Now, you refer to artillery as some type of hand-gun, pistol or revolver?

"A Yes, sir.

"Q You don't recall which of your three companions had the gun?

"A They were just all in together and, you know, just all standing in together.

"Q Now, how many pistols or guns did you see

[fol. 452] "at any time while you were in the store?

"A Three. Two. Two, I think.

"Q Two?

"A Yes, sir.

"Q That is, two different guns, is that correct?

"A I think so, yes, sir, I think so. Now, I'm not positive.

"Q Now, after this shot rang out, where did you go and what did you do at that time?

"A I ran out.

"Q The front door?

"A Yes, sir.

"Q And did you get into somebody's car or did you just run down the sidewalk?

"A No, sir, we got into the car.

[fol. 453] "Q Whose car was it?

"A The guy—Gil's car, I think it was.

"Q Gil Cooper's vehicle?

"A Yes, sir.

"Q Do you know what type of vehicle that is?

"A A Mercury.

"Q Do you know what the color is?

"A It's green or blue.

"Q Is it a solid green or solid blue?

"A No, it's two-tone.

"Q And do you know what year Mercury it is?

"A '56, I think.
"Q Two-door or four-door?
"A I think it's a four-door. I'm not for sure.
"Q All right, did you get in the driver's seat to drive this vehicle away?
"A No, sir.
"Q Who did?
"A He drove his own car.
"Q That is, Gilbert Cooper?
"A Yes, sir.
"Q Drove his own car away?
"A Yes, sir.
"Q And what part of the vehicle did you get into?
[fol. 454] "A The back seat.
"Q On the driver's side or passenger's side?
"A I don't recall if I was on the passenger or the other side. I don't recall which side I was on. I just got in.
"Q Who was in the front seat with Gilbert Cooper?
"A I think it was Charles, I don't know for sure.
"Q Is Charles a male Negro?
"A Yes, sir.
"Q About how old is he?
"A I'd say he's in his late twenties.
"Q About how tall is he?
"A A little—I think he's a little taller than me, I don't know. I think because we stand just about—I think he's a little taller than me.
"Q About how much does he weigh?
"A Oh, about 150 or something like that.
"Q Do you know what Charles's last name is?
"A No, I didn't, sir.
"Q Do you know where he lives?
"A All I know, his residence is supposed to be in Compton. I don't think he's stabilized. I think he just moves around.
"Q Do you know what his home phone number is?
[fol. 455] "A No, I don't, sir.
"Q Do you know where he works?
"A I don't think he does.

"Q Have you ever known of any job he has held?

"A Not at any time I have known him.

"Q Do you know what type of car he owns or drives?

"A Well, he has a Buick and he has a Chevy, I know.

"Q How about this other person that was with you? What does he look like?

"A The Caucasian?

"Q Yes.

"A Blond-headed fellow.

"Q About how old is he?

"A Oh, I guess—I really don't know because I don't know. I didn't pay too much attention—I figure he might be in his early thirties or something like that.

"Q How tall is he?

"A About five nine, I guess.

"Q How much does he weigh?

"A (No answer.)

"Q Do you know what his full name is?

"A Sir, I don't even know that man's first name.

[fol. 456] "Q All right. After you got in the car—by the way, which door did you open to get in the car?

"A From the curb side.

"Q From the curb side?

"A Yes.

"Q Did you have to lean a seat down to get in the vehicle, which is on a two-door, or did you just get into the car, which is a four-door?

"A If this is a four-door, like I'm thinking it is, you don't have to lean the seat down, I don't know, but I just don't recall at the present time. I've seen the car; I was with him when he bought the car.

"Q All right. What happened after that? Which way did you gentleman drive the vehicle?

"A North.

[fol. 457] "Q And how far did you go north?

"A About two or three blocks, turned left and went west.

"Q Two or three blocks, is that a stop sign or a stop light?

"A Yes, I think it's a stop light.

"Q Was the light red or green when you went through the intersection?

"A (No answer.)

"Q Then which way did you drive?

"A West.

"Q How far?

"A Across the tracks about a half a block.

"Q And which way did you go?

"A Turned left right there on the corner.

"Q What happened at that time?

"A Got out of the car.

"Q Who else got out of the car with you?

"A Everybody got out of the car but Gil.

"Q Gil Cooper stayed in his own vehicle?

"A Yes.

"Q All right, did Gil stay there with all three of you or did Gil drive away?

"A Well, everybody drove away.

"Q All right, what kind of car did you get into?

[fol. 458] "A That was a—that was a blue, about a '54 Ford, I think.

"Q Two-door or four-door?

"A Four-door, I think.

"Q All three of you jumped in this blue '54 four-door?

"A Yes.

"Q Was this vehicle parked at the curb?

"A Right at it, just as you turn the corner, yes.

"Q All right, was there somebody in the vehicle or close by the vehicle when you fellows pulled up in Gilbert Cooper's Mercury?

"A Yes, sir.

"Q Did you know this man?

"A Not personally, sir.

"Q Was he the owner of the vehicle?

"A Now, Charles, that's his—I don't know. I don't know, sir.

"Q In other words, there were four of you drove away in this '54 Ford?

"A Yes, sir.

"Q Had you seen this person earlier in the day?

"A The one that was sitting in the car?

"Q Yes.

[fol. 459] "A I had saw him about two days before.

"Q You didn't see him Friday morning or Friday afternoon—that was yesterday?

"A I saw them when we picked them up, when we met them.

"Q Mm-hmm.

"A We met them, and we both just turned around and come back. I was riding with Gil then.

"Q Did you hold a conversation with this friend of Charles' that was driving the '54 Ford?

"A Not personally.

"Q Did Charles hold a conversation with him in your presence?

"A Yes. Well, he talked to everybody, you know.

"Q Charles did?

"A Yes.

"Q What did Charles say to this other person regarding this market? And the stickup?

"A Well, I don't know the whole conversation that they talked about, but I do know that he told him to stay there and wait.

"Q And how long was he to wait?

"A I don't know. Until we got there, I guess, I presume.

"Q When you got in the car, did you have any [fol. 460] conversation with this individual as you were driving down the street?

"A No, sir.

"Q Did he have a gun?

"A I don't know, sir. He had a coat on, a heavy jacket.

"Q What did Charles say to him at that time? Regarding this market?

"A Well, it wasn't the—there wasn't too much said at all.

"Q Well, do you recall what he said?

"A I think it was, 'Let's go in a hurry,' or 'Let's get away from here,' or something like that. That's all there was.

"Q Was there any conversation in the car at that time about how much money or anything you got out of the market?

"A No. No, sir.

"Q Did you get anything from the market?

"A I'm pretty sure that there wasn't a penny taken from the market. I didn't, and I was the one that was pushed to do this, and I didn't get a penny. There wasn't a penny taken from there.

"Q There wasn't a penny taken from the market by anybody?

"A By anybody. Well, I say anybody, but why I [fol. 461] say this, because the way things went so fast, didn't nobody even get anything.

"Q All right, after you left the vicinity of the market you were driving away in this '54 Ford, where did all four of you go after that?

"A I caught the bus on, I think Crockett and Nadeau.

"Q And where did you go?

"A I went to my sister's house.

"Q What is this address?

"A 2258 East 97th Street.

"Q How long did you stay there?

"A Well, I was there for quite some time, I don't know hours, but I was there for quite a few hours.

"Q Was your sister home at that time?

"A (No answer.)

"Q What is your sister's name?

"A Theresa.

"Q Bosby?

"A Yes.

"Q And how old is she?

"A She's 28, I think.

"Q And later in the evening did you meet Charles and this Caucasian some place in Los Angeles?

"A Yes, sir, unintentionally.

[fol. 462] "Q Unintentionally?
"A Yes, sir.
"Q Where at?
"A We were going—I was coming down Wilmington—I think it was—I think I was going down Wilmington, and I ran into them and they said, 'Let's go get a drink,' and I said, 'Okay, I'll go with you.'
"Q Now you were driving down Wilmington?
"A Yes.
"Q In your vehicle?
"A Yes.
"Q What type of vehicle is that?
"A Simca 60.
"Q What color is it?
"A Black at the top and kind of a brownish-looking at the—beige-looking at the bottom.
"Q And approximately what street were you on on Wilmington, or near what intersection?
"A Well, I'd just left 103rd.
"Q Were you driving north or south?
"A South.
"Q And where did you see these other people?
"A Coming north.
"Q North. And what type of car were they in?
[fol. 463] "A Buick I think it was.
"Q Two-door or four-door?
"A Two-door I think.
"Q And what year?
"A About a—
"Q And what car?
"A About a '55 and I think it was green. I'm not for sure.
"Q Who was driving the vehicle at that time?
"A This guy, Charles was driving and the other guy was sitting on the other side.
"Q That is the white guy that was with you on this market stickup was on the right-hand side?
"A Yes.
"Q And there was somebody else in the vehicle?
"A Not at this time.

"Q All right, what did you do after you met these people?

"A We were going to Imperial and Compton to the liquor store.

"Q All right, were you in the Buick at this time?

"A Yes, I rode with them because my starter was gone on my car.

"Q All right, now was there any conversation
[fol. 464] "when you were in the Buick at that time when you were going in the Buick down to the liquor store, between you and Charles about the liquor store?

"A No, the only conversation that came up about the whole thing was they were going to bust the pistol up.

"Q Whose pistol was it?

"A I don't know.

"Q Who had the pistol at that time?

"A It was laying in the front seat.

"Q What did the pistol look like?

"A I don't know. About that long.

"Q Indicating—

"A No, sir.

"Q Approximately eight inches over-all length.

"A And they took it and they banged it on the sidewalk and—

"Q Who did that?

"A Charles did this.

"Q How many times did he hit it on the sidewalk?

"A I really don't know. He hit it.

"Q What was the purpose of doing this?

"A That I don't know either.

[fol. 465] "Q Did he make any comment or talk while he was doing this?

"A I presume they had made their mind up what they were going to do. We went down 115th and down toward Compton.

"Q From Wilmington?

"A And on the right-hand side threw it out on this lawn. Now this lawn that they threw it out on, I just presume, I know that this is where it was be-

cause I just—see, I saw it when they did it, when he threw it out.

"Q Is that a lawn that you directed us to this afternoon?

"A Yes.

"Q Where we did not recover the firearms?

"A Yes, sir.

(Sgt. Rowley left the room.)

"Q And what happened after that?

"A Went to the store and they were taking me back to my car and I left.

"Q Where did you go then?

"A I went—I went to my sister's and I left my sister's and went to a club on 97th and Wilmington.

"Q Now, have you seen any of these people that you were involved in on this liquor store, this market,

[fol. 466] "since last night?

"(Sgt. Rowley returned.)

"A No, sir. No, sir.

"Q Have you seen Gilbert Cooper since then?

"A No, sir.

"Q Now when you and Gil—

"A Gil went to work last night.

"Q Excuse me just a moment, please? When you and Gil were more or less talking about this market, how much did you expect to get from the market?

"A Oh, well, I'd say around 1500 to 3000.

"Q What do you base this estimate of amount of money on?

"A I wasn't, I actually wasn't doing the basing. I had cashed my check there before, he had cashed his check there before, and just, I don't know. I had no one, this is nothing, was no setup or nothing, you understand. It was just I had been cashing my check there. When I was cashing my check it was from September of '63 till around March of '64.

"Q Did you tell Charles and this other person that you expected to get between 1500 and three or four

[fol. 467] "thousand dollars out of the grocery store?

"A Charles—we talked, I had talked to Charles in

the pool hall. Charles went to the store himself. He had gone to the store before previous, and he said, 'Well, . like it' it's a nice deal.' So we, you know—

"Q When did Charles go to the liquor store before that happened?

"A Oh, this is about two weeks, something like that, before it happened.

"Q Daytime or nighttime?

"A In the daytime.

"Q Did he cash a check there?

"A No, I think he just bought some merchandise."

THE COURT: We will take our recess, afternoon recess, at this time. We will recess for 15 minutes, ladies and gentlemen.

(Recess.)

[fol. 468] THE CLERK: You are still under oath. Will you please state your name again for the record, please.

THE WITNESS: Charles William Vaughn.

THE COURT: You may continue, sir.

THE WITNESS: (Continuing reading:)

"Q You were with him at this time?

"A No, sir.

"Q He went by himself?

"A Yes, sir.

"Q To look over the market?

"A Yes, sir.

"Q And did he come back and talk to you about the market or the liquor store? Grocery store?

"A Well, he came back and he just talked to me about the whole thing, the whole deal. He just told me that he thought it was a pretty nice deal.

"Q And where were you at that time? Back in the pool hall?

"A I don't know, no. We was—"

THE COURT: Sir, excuse me. I don't think there is a "know" in there. Do you want to read that answer again, please?

THE WITNESS: (Continuing reading:)

"A I don't—no," n-o.

THE COURT: All right.

THE WITNESS: (Continuing reading:)

[fol. 469] ". . . we was at this girl—at this girl on 97th and Wilmington.

"Q Well, was there any conversation or sort of agreement as to when you—maybe you would knock over this grocery store?

"A No.

"Q Did you think maybe you'd do it within another week or two?

"A Well, me, myself, I had no idea.

"Q Mm-hmm.

"A I mean, truly speaking, I had no idea, nobody had made no plans when this would be or anything. But the only thing we did say, that if we did do it, it would be a Friday, which would be a pay day, I mean for cashing checks.

"Q Did you know that the market normally cashed a large amount of paychecks on Friday?

"A I didn't know anything about the large amount. All I knew is that they cashed checks.

"Q Did Gilbert Cooper say anything to you about the amount of money that he was thinking, or that he thought he could get out of this market?

"A No, but he thought, he told me, 'Well, if they cash checks,' he say, 'well, where you work?' and I told him I was working for Emsco Glvanizing.

"Q And what kind of guns did Charles tell you [fol. 470] that he was going to take up on this job?

"A Well, he didn't tell me what kind of guns.

"Q What did he tell you about it?

"A He just told me that when we got ready to go, when we met him that morning, and he turned around and say, 'Do you have your equipment?' and I say, 'Yes, I have my equipment.' That's all that was necessary.

"Q Excuse me, who said this?

"A When we got together that morning, well, Gil, that afternoon, well, Gil asked—or asked him, 'See, you got your equipment?' and he said yes.

"Q That is, Gilbert Cooper asked this Charles fellow?

"A Gilbert Cooper asked him, and he says, 'You mean'—and a lot of slang and, 'Sure, man,' you know, 'everything's all right.' But that was all that was necessary.

"Q Did Cooper ask you if you were okay?

"A No, Cooper knew that I didn't have anything.

"Q Uh-huh. But you knew that Cooper had a piece of artillery?

"A No, I didn't. I don't think Cooper had any. If he got it—that's what I'm telling you—there must have been only two.

[fol. 471] "Q Well, you were present when Cooper asked Charles if he had his artillery, or something to that effect?

"A Yes.

"Q Exactly what did Cooper say?

"A 'You got your stuff, Man?'

"Q And what did you think he meant by that?

"A Well, I knew what he meant.

"Q What did he mean?

"A I mean, did you have the weapon, you know.

"Q Now, if Cooper would have asked you the same question—"

THE COURT: Excuse me, sir. Go back to line 13. I think you mispoke yourself.

THE WITNESS: (Continuing reading:)

"Q What did he mean?

"A I mean, did he have the weapon, you know."

Is that it?

THE COURT: Yes, sir.

THE WITNESS: (Continuing reading:)

"Q Now, if Cooper would have asked you the same question and if you had a gun, would you know what he was talking about?

"A Yes, sir, if he asked me the same question.

[fol. 472] "Q Now, did anyone ask this other, this white person, if he had a piece with him?

"A Well, he was Charles' friend. So if Charles had it, he had it.

"Q You are reasonably certain in your own mind that Charles had a piece and so did the other kid?

"A Well, yes.

"Q Did you ever see the Caucasian with a piece of artillery?

"A No, but I had talked to Charles; Charles had talked to me about it before.

"Q What did Charles say about it?

"A Well, he just told me what type of person he was.

"Q What type of person was he?

"A The type of person that wanted to make money.

"Q By what?

"A He just said, you know, 'His type of person, he'll make money.' That means he would go and take a business or something, and wouldn't welch on no one if they were taking care of a business or something like that. Could I have something for this eye? Just cold water.

"Q What was said about how you were going to [fol. 473] "divide up the money on this caper?

"A You know, Officers, that never came on up—how the money was going to be divided. That is the honest to goodness truth, from here to heaven. That never came up.

"BY SGT. VAUGHN: Sgt. White, would you like to ask Mr. Bosby some questions?

"BY SGT. WHITE:

"Q Jesse?

"A Yes, sir.

"Q How was this thing to go down at the start? Who was supposed to go in first?

"A Either Gilbert or I.

"Q But who did go in first?

"A Gilbert.

"Q And did you see Gilbert go in and come out?

"A I didn't see him leave, sir, but I saw him when he come back in the second time.

"Q The second time?
"A Yes.
"Q And where were you when you saw him come in?
"A I had just left the beer box.
"Q Now, what were you supposed to do?
"A I'm the one supposed to get in the drawer is
[fol. 474] "open.
"Q In the cash drawer?
"A Well, it's a drawer, you know, just pull out, whatever it is, I don't know.
"Q Where is this drawer located?
"A Well, the cash register is on one end and the drawer is on the other end.
"Q Where is the drawer from the cash register? Towards the window or towards the back of the store?
"A Well, more or less toward—here is this counter, and this is—
"Q Here is the cash register right here, and here is the front door.
"A Well, right here.
[fol. 475] "Q It's supposed to be—in other words, east of the cash register and towards the delicatessen there and the liquor? Right there?
"A About right there.
"Q And this is supposed to be a drawer, cash register drawer?
"A This is a drawer that pulls out and pushes in.
"Q How did you know there was a drawer there?
"A I had cashed my checks there before.
"Q Did you see them go down in there and take out cash?
"A Cash checks, yes, for the company I was working for. The majority of the guys get their checks cashed there.
"Q When all four of you got together and were first talking about this thing, whose idea was it to take this particular store?
"A Well, we were coming down Holmes one day, Gil and I, coming from out where he worked, and he had picked up his check. I says, 'Why don't you cash

your check here?' I says, 'I've cashed my checks here before and they are very nice people.' And he says, 'What the heck,' you know. So he went in, cashed his check and bought a half pint of Old Taylor and she cashed his check for him. When he come back out,
[fol. 476] and he says, 'Wow, Man,' he says, 'they keep quite a bit of money there on hand.' I said, 'Man, when I used to cash my checks here before, they kept quite a bit on hand.' That was just Gil and I. No one else was in on it.

"Q How long before you actually, all four of you, went in there did this happen?

"A Before this happened the other day?

"Q Yeah.

"A When Bill and I went in there to cash checks?

"Q Right.

"A Oh, about three weeks to a month.

"Q Then the two of you had been talking about this for two or three weeks?

"A It wasn't anything that we actually talked about, because, see, he worked at night and I worked days. But if we got together on a week end, well, then we probably talked about it then.

"Q You probably talked about it on a week end?

"A Yes.

"Q Did you ever talk about how you were going to do it?

"A Well, I don't know. It was just that go in and do it, I suppose.

[fol. 477] "Q All right.

"A Well, see, we had talked, he and I, we talked, but the conversation when I would see him, we would talk about and so forth, wasn't anything that, you understand, what I mean, had anything to do with how we was going to set it up or anything like that.

"Q Just thinking about how much money they had there and how good it would be to have that money?

"A Yes.

"Q But apparently the two of you decided that you couldn't do it yourselves, is that right?

"A Well, it wasn't that either. See, we didn't have nothing.

"Q What do you mean, you didn't have nothing?

"A We didn't have any weapons or anything.

"Q So what did you do? Go out and try to find somebody who had some?

"A Like I told you, we were shooting pool a lot of times, Charles and I, you know.

"Q Yeah.

"A And we got to talking, you know, and he was telling me about, well, that he hadn't worked in so long. And I said, 'Well, what you doing?' and he told me about his wife and she's on County. I never seen [fol. 478] his wife; I never even been out to his house in Compton. It's in Compton some place, So—I don't know where—anyway, I told him, 'Well, I saw a nice place,' one night in the pool hall. So he asked me, he says, 'Where?' I said, 'Oh, no, no, no, just kidding.'

So, just to go on some time, because a lot of times we"—

THE WITNESS: Excuse me, your Honor, I am too sleepy. I can't go any more—drunk from lack of sleep.

THE COURT: All right, you gentlemen, do you have any objection if I read it?

MR. GORDON: No, your Honor.

THE COURT: It doesn't make any difference to me, Mr. Warnberg or one of you lawyers can read it.

THE WITNESS: May I sit down and doze in the back of the court?

THE COURT: You may go out in the hall, sir.

MR. GORDON: Your Honor, would it be more preferable to let the prosecutor read it?

THE COURT: Fine with me.

MR. GORDON: That would be fine with me.

You can read it from there, if you can read it loud enough.

MR. WARNBERG: Where did he leave off?

THE COURT: He left off at line 13, sir. Start in the middle of line 13, "So—"

[fol. 479] MR. WARNBERG: (Reading:)

"'* * * No, no, no, just kidding.' So, just to go on some time, because a lot of times we would go to the pool hall and we'd shoot pool, just like going bowling, just once, twice or three times a week. So we got to talking about it and he told me 'What you going to do about it?' I says, 'Well,' you know, 'I don't know.' So then I went over to Gil's house that morning and we got to talking about it. I woke him up and we got to talking about it. He says, 'Okay, you for it? Let's go.' I says, 'Well, I got to go to the employment office.' He says, 'Well, good, I have to go and pick up the check,' plus I got to go and get a part-time check. He says, 'Okay, will I see you around? What time?' I says, 'Maybe about 10:30, something like that.' He says, 'Where you going to meet?' I says, 'Slauson and Holmes.' He says, 'Okay.' So I was late because I had to go over to Beverly Hills to pick my check up. So when I got back, well, he was there and we went riding. He and I went riding. He says, 'Well, what about him, that guy you was telling me about, Charles?' I said, 'Man, why don't we ride out there on Willowbrook and El Segundo and see what happens?'

And we was on our way out there and they passed

[fol. 480] "us and we blew—

"Q This was yesterday afternoon, Friday afternoon?

"A Friday, about, well, yes, afternoon—about, something—I don't know exactly what time it was, sir.

"Q Some time between 10:00 and 1:00?

"A Yes, sir, some time between 10:00 and 1:00.

"Q And when you met them out there, what did you do?

"A Well, we blew for them, they stopped, we pulled back up behind them and stopped. And they said, 'Well, where you guys going?' And they said, 'Well, we're going out to 103rd,' and evidently he had to pay a gas bill or something, I don't know what it

was. But he asked us, 'Well, what you guys doing?' I said, 'Well, I don't know.' He says, 'Well, I been thinking about that this morning.' I says"—

THE COURT: "That thing this morning," line 3, "about that thing this morning."

MR. WARNBERG: (Reading:)

"'about that thing this morning.' I says, 'I don't know.' I says, 'Probably too late now,' you know. He says, 'Well, why don't we check it out?' So we
[fol. 481] "checked it out.

"Q Who said, 'Why don't we check it out'?

"A Charles. So he say, 'Yeah,' he says, 'Everything all right,' so okay. So just like that—

"Q So you got two cars, and what was there? Five men? You and Gil and Charles and the patty and another colored stud?

"A Mm-hmm.

"Q So you got two cars and you met down here on Wilmington Avenue, is that right?

"A Wilmington is where we were at; that's where I met them, yes.

"Q Okay, how did you leave the Wilmington area? Did you and Charles drive in Charles' car some place?

"A No, I still rode with Gil.

"Q Okay, and then Charles and the two others rode in his car?

"A Yes.

"Q And where did you go from there?

"A To where—to where the car was going to be parked.

"Q And where was that?

"A That was on—about a block and a half from the place, turn to the left, go across the tracks and
[fol. 482] "then turn to the left again. I don't know the name of the street.

"Q Would it be roughly 61st and Converse?

"A Somewhere in there I guess.

"Q Okay, at any rate, who was following who in this car?

"A Well, at first they were following us.

"Q And Gil drove right to 61st and Converse? And did he park there?

"A He did park.

"Q And were they right behind you?

"A No, sir.

"Q How long did it take them to get there?

"A Well, they came about ten minutes later and they saw it and they just drove on past and went around a couple of blocks and drove around and then they said, 'Okay, since everybody know where the car going to be and go forth there won't be no problem.' So there wasn't nobody in any hurry then. So they said, 'You ready?' So Gil got in his car, drove down to—I think that was Gage, because he said he had to get gas for his car.

"Q Mm-hmm.

"A And then when he got gas he come on back up.

"Q Holmes?

"A Yes, and parked.

[fol. 483] "Q Parked where?

"A Well, he parked not too far from the store. Just up the street a ways from the store.

[fol. 484] "Q How many car lengths away from the store?

"A About two.

"Q About two car lengths?

"A Yes.

"Q And what were you and the other three studs doing?

"A These other—Charles and the other dude was together.

"Q Charles and the patty?

"A They were together.

"Q Uh-huh.

"A I was alone.

"Q You were walking ahead of them?

"A No, I wasn't even walking the same direction they was walking.

"Q Oh?

"A See—

"Q What happened to the other one, then? You say there was Charles and the patty and another colored fellow. What happened to him?

"A Oh, he was in the car.

"Q He stayed in the car?

"A Yes.

"Q Before all of you left where you parked the car, did you make up some kind of plan as to what was going to happen inside the store; what each one [fol. 485] of you were going to do?

"A Oh, well, I mean, the only thing was that one man get the money; either I cash the check or Gil cash the check, but I had a check plus Gil had a check. I had a part time check and he had one from his job.

"Q Who was it finally decided was going to get his check cashed? Who was going to present a check for being cashed?

"A We both did, actually, but Gil, or I don't know if he got his cashed or not.

"Q You don't know if he did or not?

"A No, sir.

"Q Okay. But actually, who went in first again, Gil?

"A Yes, sir.

"Q And then did you see Gil come out at all, before you went in?

"A No, sir.

"Q Well, didn't Gil actually get out in front of his car and raise the hood in front of this store?

"A I don't know this, sir.

"Q You don't know about that?

"A No, sir.

"Q At any rate, when you walked in, Gil was in [fol. 486] the store?

"A He was in the store, yes, sir.

"Q Then you saw him come back in?

"A Yes, sir.

"Q And you were standing back there by the beer case?

"A Yes, sir. See, I walked in and I asked to cash

my check. She said she's fixing to cash this gentleman's check. So I went back to the beer case.

But I find out he didn't even have it with him, I presume, so he ran out to the car to get it.

So when I come back from the beer box, he came through the door and he had the check in his hand.

"Q Now, where were the other two, Charles and the patty? Where were they when Gil came back in?

"A Coming through the door.

"Q They came in about the same time?

"A I presume it was about the same time. Don't quote me on that, Officer, I don't—

"Q How far away from the front of the store did Charles and this patty get? How far into the store did they get? Back as far as you did? Back to the beer case?

[fol. 487] "A Not all the way to the beer case but they had gotten back past here, about in here, but they never did get all the way back to the beer case.

"Q How far away from the cash register did you ever see Charles?

"A Not too far.

"Q Well, did he get—

"A About.

"Q Did he ever get any further than the delicatessen counter?

"A I couldn't say, sir.

"Q Okay. Where did you see him? How far back did you see him go?

"A I saw him up to here, up to along in here some place.

"Q You are referring to the west end of the delicatessen case?

"A Yeah. I mean, they was moving; people was moving around. And I can't tell this, for I just—like it was just—because I was hysterical, too, after I see all this going on and everything. And, like I said, I never did anything like this before. So naturally, I was hysterical.

"Q All right. After the shot, everybody was hysterical and everybody split, is that about what happened?

"A Yes.

[fol. 488] "Q Did anybody tell the lady and the other man to get out of the back of the store?

"A I didn't hear anything like that, sir.

"Q You didn't hear anything like that?

"A No, sir.

"Q Now, tell me again where the old man was when you heard the shot.

"A He was standing behind the delicatessen.

"Q Is this where—we have an 'X' marked here behind what represents the delicatessen. Is there where he was standing?

"A Yes, I don't know for sure, but anyway, he was behind the delicatessen box.

"Q All right. Now, where was Gil when you heard the shot?

"A I don't know, sir.

"Q Where was the patty when you heard the shot?

"A There was some more people in the store at this time.

"Q Yes?

"A And I don't know, because there was people just around, I don't know.

"Q Where was Charles when you heard the shot?

"A Everybody was in the store.

"Q Everybody was in the store, but were they all

[fol. 489] together?

"A No, I don't think—I don't know, sir. I don't know if they were all together or not.

"Q Where were you standing when you heard the shot?

"A Oh, on this side of the box somewhere.

"Q Over toward the center of the store, near the delicatessen?

"A Yes, sir.

"Q Did you ever get back in here in the passageway here?

"A No, sir.

"Q Who all were in the store besides the four of you and the lady and the old man and the younger

man? Who all was in the store besides you? Did you know anybody in there?

"A No.

"Q Were there any other people in there besides you and the lady and the older man and the younger man?

"A Besides the four of us?

"Q Yes.

"A Well, three more men came.

"Q Three more men came?

"A Yeah, I think it was three men came in.

"Q What did these men look like?

[fol. 490] "A One was a Spanish fellow and two was Caucasian, I think.

"Q How old were they?

"A The Spanish fellow, he was—I don't know, he was about—I don't know. They weren't, either one of them, wasn't young men. They was over their thirties, I think.

"Q Were they over their forties?

"A Possibly, but I don't know for sure.

"Q Could they have been over fifty?

"A I really don't know. I didn't pay that much attention. But I saw them coming in.

"Q Did you see any women in the store other than the lady that runs the store?

"A A little girl, I think.

"Q Did you see a colored lady in there just before the shooting?

"A Not as I recall.

"Q You don't recall?

"A No, sir.

"Q All right. Prior, while you fellows were sitting over there on Converse and 61st Street getting ready to come around here, who had the guns?

"A They were in the other car.

"Q In the car?

"A The other car, yes.

[fol. 491] "Q Other car?

"A Yes.

"Q Did you see them?

"A No, I didn't.

"Q Did you see any guns at any time? Even while this was going on?

"A Yes.

"Q What kind of barrel did these guns have?

"A About—

"Q Roughly six or eight inches long?

"A Something like that.

"Q I see you are indicating there. Now, how did this barrel look? Was—see, this is a lot shorter barrel. Did it look something like that or did it look any different than that?

"A I don't know. See, when I saw it coming back like that, it was over at this, over the—

"Q Counter?

"A Counter, yes.

"Q Over the counter?

"A Yes.

"Q Who had that gun?

"A That's what I'm saying, that's the whole thing. I think there was two.

And I really don't know how he was pushed. I don't know who had them or who was pushing who, [fol. 492] because at that time, the time I get right back up to where—almost to right here, this gentleman here comes right here and tells me, 'You're with them,' you know.

"Q Uh-huh.

"A And I tell him, I says, 'No, sir, I'm not with them.'

He says, 'Oh, yeah? You're with them.' And then he went hysterical.

"Q All right. Did you strike this man at any time after he said, 'You are with them'?

"A No, I don't think I struck him.

[fol. 493] "Q Did you hit him?

"A I don't know, sir, I don't think I struck the man.

"Q What did this guy look like that said, 'You're one of them'?

"A He had glasses on.

"Q What kind of hair did he have?
"A I don't—he was no young man, sir.
"Q Well, does he have hair like my partner, Sergeant Vaughn or Sergeant Rowley or myself?
"A I don't know, sir.
"Q Did he have glasses on?
"A Yes, sir.
"Q Okay, when you cashed your checks in there previously, who cashed them for you?
"A The lady.
"Q The lady?
"A Yes, sir.
"Q The same lady that was in there that night, yesterday?
"A Yes, sir. But when I was cashing my checks, this was, like I said, from September, '63, to around March of '64, because I got laid off at Emsco Galvanizing and I went back to work out in Vernon."

MR. GORDON: Just a moment, if your Honor please, [fol. 494] may I have a stipulation on the next couple of lines?

MR. WALTON: I believe line 16, your Honor.

MR. GORDON: No objection other than that.

MR. WARNBERG: Counsel is referring, your Honor, to line 16 through 20.

MR. GORDON: That is by stipulation.

THE COURT: Shouldn't it be from 14 through 20, sir, as long as you are stipulating?

In the stipulation, you may not read lines 14 through 20, sir.

MR. WARNBERG: That's right, your Honor.

Where did I leave off?

MR. ROSEN: Line 10.

THE COURT: Start with line 10, sir.

MR. WARNBERG: Thank you.

(Reading:)

"All right, now you have done pretty good so far with us, and we appreciate your cooperation. But now we need the name of Charles and where he lives and we need the name of the patty that was with you

and the man that sat in the car and waited until you came back. Was he supposed to wait there in the car and keep the car running or something?

"A I think that he was—I know he waited in the car, yes.

"Q Mm-hmm.

[fol. 495] "A But as far as business like that, he would never talk to me about anything like that.

"Q All right, at any time during this meeting with Charles and the white man and the other fellow down on Wilmington Avenue and at the time that you were with Gil; and when you say Gil, were you talking about Gil Cooper?

"A Yes.

"Q And you said a while ago you hadn't seen Gil since you left the area yesterday afternoon, right?

"A That's right, sir.

"Q Didn't you see him this afternoon?

"A When he was out there.

"Q Yes.

"A Yes, sir.

"Q Okay, now this is the only time that you have seen him?

"A Oh, yes, I saw him out there.

"Q In other words, you know that"—

MR. WARNBERG: May I just take a look here a moment, your Honor?

May I go ahead?

THE COURT: Go ahead.

MR. WARNBERG: I am sorry.

(Reading:)

[fol. 496] "In other words, you know that Gil's under arrest and we've got him here at the station?

"A I do now, but when I first came in I didn't.

"Q Now, like I started a few minutes ago, now during the time that all five of you got together and drove over on Converse and 61st, did you at any time have a weapon in your possession?

"A No, sir.

"Q And at any time during this store—this activity in this store, did you have a weapon in your hand?

"A No, sir.

"Q Did you shoot the man?

"A No, sir.

"Q Now, you are telling me that everybody else was up around the front of the store when you heard the shot, isn't that right?

"A I'm telling it just the way I heard it.

"Q You are telling me that the old man was here behind the counter, isn't that right?

"A Yes, sir. He may not have been this far back, sir, but he was over there"—

MR. ROSEN: "over here."

THE COURT: "over here."

MR. WARNBERG: I am sorry.

[fol. 497] (Reading:)

"But he was over here.

"Q And you said you were on the other side of the delicatessen?

"A Yes, sir.

"Q And that would have put you, roughly, six or eight feet away from the old man when the shot went off, is that right?

"A Maybe a little further than that.

"Q Was there anybody any closer than that to him?

"A I don't know, sir, I don't think so.

"Q After you heard the shot, is it correct that you told us they walked out toward the front of the store, out in the middle of the store?

"A Yes, he did, and he came to right here. He was coming to, I'm pretty sure to attack one of the fellows.

"Q What do you mean, he was going to attack one of the felloss?

"A Well, because he reached at one of them, and just pushed him, he evidently pushed him. So he fell back up against the thing and went back on around it.

"Q Did you see anything knocked over or spilled?

[fol. 498] "(SGT. ROWLEY left the room.)

"A I don't know, sir.

"BY SGT. VAUGHN:

"Q When the old gentleman that was shot came back out from behind the deli, how close were you to this gentleman at that time?

"A When he came back out to right here?

"Q Indicating the center of the store.

"A Yes. Well, I was quite a ways from him.

"Q At any time after he was shot, did you have any contact with him? I mean, did you touch him or westle him or anything of that nature?

"A No, sir.

"(SGT. ROWLEY returned.)

"A Is that what I was supposed to have did?

"Q Excuse me, this is the coat you had on yesterday, right?

"A I didn't have a coat on.

"Q Oh, this isn't the one you had on yesterday?

"A I didn't have a coat on.

"Q What were you wearing yesterday?

"A I had a little vest on, some kind of a little vest.

"BY SGT. VAUGHN: I have nothing else, "Ser-

[fol. 499] "geant White.

"BY SGT. WHITE:

"Q I have a few more questions here, Jesse. I see you've got a black eye there?

"A Yes, sir.

"Q How did you get that black eye?

"A Well—

"Q Well, in other words, you were arrested this afternoon by some uniformed deputies, isn't that right?

"A Yes, sir.

"Q Down at about 92nd—

"A 93rd and Belhaven.

"Q And what happened when you were arrested down there?

"A Well, they came in, and one snatched me—

"Q Who came in?

"A The two deputies.

"Q Where were you when they came in?

"A When they first came in I was in the bedroom. And then I heard someone say, 'All right, come on out of there.' So then I heard the name Bosby, so, well, so at this time one came through the window and one came through the door over there and said, 'You heard me calling you. Why didn't you come out of there?'

[fol. 500] "Q Actually, weren't you hiding in the closet?

"A I'm standing right by the closet, I wasn't standing in the closet. I'm standing—actually, I wasn't hiding in the closet.

I'm standing right here when I see this officer here. At first I was starting to the bed. When I seen that officer there do something through the window, I jumped back and got against the wall like that, by the closet.

Well, this thing, it's a spread or something she keeps on the shelf there. So I grabbed—I just took the spread and put it on over in front of me.

"Q Okay.

"A Because—

"Q In other words, you know what they were after you for, didn't you?

"A I knew they were after me.

"Q And you knew why.

"A Well, I had a good idea why.

"Q In other words, you knew that the old man was dead, didn't you?

"A No, sir.

"Q But you know it now, don't you?

"A Yes, sir.

[fol. 501] "Q But in other words, they were in there trying to—or in the process of arresting you on suspicion of murder, is that right?

"A Yes, sir.

"Q And this man was shot up there, wasn't he?

"A Yes, sir.

"Q All right. Okay. Now, is your eye all right now?

"A Just aching is all.

"Q You want some medical attention for that?

"A I would like—I was going to try some cold water on it.

"Q All right, we'll see that you get some attention for it.

Now, since you have been with Sergeant Vaughn and Sergeant Rowley and myself today, how have you been treated?

"A Very intelligent-like and very nice.

"Q I am going to ask you this. Has everything you have told us here tonight been the truth, to the best of your knowledge?

"A To the best of my knowledge?

"Q Has anybody used any force or threats of force or violence or fear upon your body or your person to get you to make these statements?

[fol. 502] "A No, sir.

"Q Was this statement made of your own free will?

"A Yes, sir.

"Q And like we told you at the beginning of this, this statement can be used against you in court, is that right?

"A Anything I say can be used against me, yes.

"BY SGT. WHITE: All right, any more questions?

"BY SGT. ROWLEY: Q Just one thing, Jesse. You did talk to your attorney prior to this conversation, isn't that correct? You called him and talked to him on the telephone?

"A Yes, sir.

"Q What is the name of your attorney?

"A Broady.

"Q Earl Broady?

"A Earl Broady.

"BY SGT. ROWLEY: I have nothing."

THE COURT: Earl Broady, Junior, was it not, sir?

MR. WARNBERG: Yes, I believe that is correct. Counsel, is that correct?

MR. ROSEN: Yes.

THE COURT: Thank you, Mr. Warnberg.

[fol. 503] We will recess at this time, ladies and gentlemen.

For the purpose of emphasis, again I will remind you and admonish you that you are not to discuss this case among yourselves or with anyone else. You are not to form or come to any conclusion with respect to the case or form any opinion with respect to the case until it has finally been submitted to you for your decision.

We will recess until 9:45.

MR. WALTON: Your Honor, may I ask you to stay on the bench for just a moment after the jury leaves?

(Jury leaves courtroom.)

THE COURT: The record may indicate the jury has left the courtroom.

MR. WALTON: Yes, your Honor. Now, in connection with the statement just read, I had made a motion prior to its reading to exclude certain portions of it.

I now make a motion to strike, and I will just read it briefly, because it is very short.

Beginning on page 19 at line 21:

"Q Did you ever see this Caucasian with a piece of artillery?

"A No, but I had talked to Charles; Charles had talked to me about it before.

"Q What did Charles say about it?

"A Well, he just told me what type of person he was.

[fol. 504] "Q What type of person was he?

"A The type of person that wanted to make money.

"Q By what?

"A He just said, you know, 'His type of person; he'll take money. That means he would go and take a business or something, and wouldn't welch on no one if they were taking care of a business or something like that."

Specifically that portion I move be stricken in that it tends to inflame the jury against Harrington, I don't feel that even an admonishment can possibly cure it. And the alternative to the motion to strike, I make a motion for a new trial.

THE COURT: Let me get this straight. Are you saying that before the statement was read that you made a motion to strike this portion, that this portion was not to be read?

MR. WALTON: That is correct.

THE COURT: Did I rule on it?

MR. WALTON: And you overruled me.

THE COURT: All right, I thought you were trying to say that something was read—

MR. WALTON: Oh, no. You overruled the objection.

THE COURT: All right.

MR. WALTON: Now it has been read and I am re-
[fol. 505] newing my motion by way of a motion to strike.

THE COURT: The motion to strike is denied. The motion for mistrial is also denied.

[fol. 506] MR. WALTON: All right. Now, your Honor, may we have the statements marked as exhibits in this, because even though these statements are in their entirety in the record, we have on the record certain line and page references which, of course, cannot be reflected except by reference to copies of the statements, which are in the position of the District Attorney.

THE COURT: The only thing is, I don't know is whether we now have any clean copies to mark. You see, we marked these all up during the conference we had in chambers.

MR. ROSEN: Not only that, but these would not, in my opinion, be admissible to the jury.

MR. WALTON: They are only to be marked for identification. I won't ask that they be in evidence. But I have made certain references to pages and lines that I feel are unintelligible unless there is something like that available.

THE COURT: You should have read them into the record, sir. That's the way to handle it. Because now we don't have a clean copy of this, and it means that if

we mark them for identification, not receive them in evidence, and want them part of the record—

I think rather than do that, if you will, at your own expense, type up the portions that you complain about—I have overruled your motion—type those up and give them to Mr. Warnberg to check and for the Court to [fol. 507] check, and after we check them, if you want to read them into the record as those being the ones that you object to and the objections were overruled, why, you may do so.

MR. MOORE: At this time, your Honor, the Defendant Cooper makes a motion for mistrial based on the reading of the Bosby statement, particularly page 18.

THE COURT: That motion is denied.

MR. MOORE: Thank you.

(Whereupon the afternoon adjournment was taken at 4:11 o'clock p.m. on Wednesday, June 23, 1965, until 9:45 o'clock a.m. on Thursday, June 24, 1965.)

[fol. 508] LOS ANGELES, CALIFORNIA,
THURSDAY, JUNE 24, 1965: 10:00 AM

THE COURT: You may proceed.

MR. WARNBERG: Thank you, your Honor.

Before putting Officer Vaughn back on the stand, your Honor, may I call, a little bit out of order, Officer Loniero.

THE COURT: Yes, sir.

THE CLERK: You do solemnly swear that the testimony you may give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

ANTHONY R. LONIERO,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

THE CLERK: Be seated, please. Will you state your name, please.

THE WITNESS: Anthony R. Lonierto, L-o-n-i-e-r-o.

DIRECT EXAMINATION

BY MR. WARNBERG:

Q Your occupation, sir?

A I'm a police officer for the City of Los Angeles.

Q Was that your occupation last December 1964?

[fol. 509] A Yes, sir.

Q Are you one of the arresting officers in this case?

A Yes, sir.

Q Who did you arrest?

A I arrested Glen Harrington.

Q That is the defendant Harrington in this case?

A Yes, sir.

Q Just point him out to us.

A The one in the brown suit, the Caucasian.

THE COURT: Indicating the defendant Harrington.

Q BY MR. WARNBERG: When did you arrest the defendant Harrington?

A On December 15, 1964.

Q Where was that?

A It was at the Hyatt Chalet Motel, 19170 Ventura Boulevard in Tarzana.

Q Is that out there in the San Fernando Valley?

A Yes, sir.

Q About what time—did you go to the Hyatt Chalet Motel; is that it?

A Yes, sir.

Q Did you go there?

A Yes, sir.

Q You got a call to that location; is that it?

A Yes, I did.

[fol. 510] Q About what time did you go there?

A I arrived there approximately 5:25 p.m.

Q When you got there where did you go?

A I went into the manager's office.

Q No conversation, but I take it you talked to him?

A I just—

Q Don't say what you said. You were there at the office?

A Yes, sir.

Q Now, what happened?

A As I was approaching the manager the defendant opened the door leading from the patio into the office and he told me that he had called me and he would like to talk to me.

Q He said he had called you?

A Yes, sir.

Q All right, go ahead; what did you say?

A I accompanied him, the defendant, out to the patio and I asked him the reason why he had called. He told me that he heard he was wanted for murder.

Q Now, you were standing out in the patio?

A Yes, sir.

Q Just you and he at the moment?

A Yes, sir.

Q All right, when he told you that what did you say?

[fol. 511] A Well, as soon as—

Q What did you do?

A As soon as he told me he was wanted for murder I turned him around and I searched him for weapons and put the handcuffs on him and at the same time I advised him of his constitutional rights.

Q All right, go ahead. What did you say?

A I told him that he had the right to remain silent, to have counsel and that anything he said could be used against him in any criminal proceedings.

Q All right; so then what did you do?

A I asked him if he wanted to tell me about it and he says, well, the previous week he had accompanied two male Negroes to a grocery store down in the Watts area of the City and he said he was driving his car and they were in his car and he parked his car in front of the grocery store and they went in to cash a check. They were in there for awhile—

Q I can't quite hear you.

A They were in there for a few minutes and he heard

a few shots and they came back out and jumped in the car and he took off—they all took off.

THE COURT: Excuse me, Mr. Warnberg.

Ladies and gentlemen, this conversation will be admitted only as against the defendant Harrington and not as against any other defendant.

[fol. 512] Q BY MR. WARNBERG: Now, did you question—did you question—did you respond to that? Did you say anything to that?

A Well, I asked him if he had gone into the store and he said, no, he had not gone into the store, he had stayed in his car.

Q All right.

A I asked him about the check. He said he thought the check was a good check that they wanted to cash.

[fol. 513] Q Then what did you do?

A Well, I told him I was going to have to take him to the station. And his wife was present with him at the hotel. And so she accompanied the defendant and myself to the station.

Q All right. Have you then told us substantially all the conversation you had with him?

A Well, he had told me he had used a different name within the last three months and that he had dyed his hair black.

Q What color—Did you notice his hair?

A Yes. It was a dark black, sort of a purplish black.

Q Did you notice anything unusual about it?

A No, just that it did appear to be dyed to me.

Q Did you question him about that?

A No.

Q I take it, then, you booked him and turned him over to the sheriffs?

A Yes, sir.

MR. WARNBERG: Cross examine.

MR. ROSEN: I have no questions.

MR. MOORE: I have none.

MR. WALTON: I have a motion.

THE COURT: Pardon me, sir?

[fol. 514] MR. WALTON: I have a motion to make.

THE COURT: Do you have any cross examination at this time?

MR. WALTON: Yes.
THE COURT: Do you want to make the motion first?
MR. WALTON: I would like to make the motion first.
THE COURT: All right, approach the bench.

(The following proceedings were had at the bench:)

MR. WALTON: The motion is to strike all of this conversation except that portion which refers to dying of the hair on the grounds that it does not constitute an admission.

It appears to possibly be referring to some other kind of shooting, because it refers to a store in Watts and not the one at 61st and Holmes, and it refers to two Negroes and not to three Negroes, which obviously is this case here.

I further would ask the Court to strike from his testimony the statement that he had used a different name for the past three months on the grounds it is not relevant to this offense, it tends to indicate that he had been engaged in some kind of lawless activity over a period of time preceding this robbery.

I feel that the only aspect of the purported conversation which tends to incriminate him in this case is the [fol. 515] statement that he had dyed his hair black.

THE COURT: Motion denied.

MR. WALTON: Then I make a motion, a further motion, for a mistrial on the grounds that the statement to the effect that he had been using a different name tends to inflame and prejudice the jury against him.

THE COURT: Denied.

(The following proceedings were had in open court in the presence of the jury:)

MR. WALTON: No cross examination.

THE COURT: Mr. Gordon, do you have any questions?

MR. GORDON: No questions.

THE COURT: Thank you, sir. You may step down. If there is no objection, you may be excused.

MR. WARNBERG: Thank you. May I now call Officer Vaughn.

THE COURT: Yes, sir.

CHARLES WILLIAM VAUGHN,

called as a witness by and on behalf of the People, having been previously duly sworn, was examined and testified further as follows:

THE WITNESS: Charles William Vaughn.

DIRECT EXAMINATION (Continued)

BY MR. WARNBERG:

Q All right, sir. Now, did you talk to the Defendant
[fol. 516] Cooper again during your investigation?

A Yes, sir, we did.

Q When was that? That was the second conversation?

A Yes, sir, it was—excuse me a minute; the third conversation.

Q All right, thank you. Yes. We finished the formal statement you had with him, and then after that did you talk to the Defendant Cooper again?

A Yes, sir, we did.

Q When did you do that?

A That was approximately 12:00 noon on December the 12th, 1964, at Firestone Sheriff's Station, in Room 115, which is an interview room.

[fol. 517] Q Who was present with you then?

A Mr. Gilbert Cooper, Sergeant Harold White, and I believe Sergeant Gerald Rowley was there also at that time.

Q And did the defendant Cooper at that time speak freely and voluntarily at all times?

A Yes, sir, he did.

Q What was that conversation?

THE COURT: Which will also be received, ladies and gentlemen, only as against the defendant Cooper and not against any other defendant.

THE WITNESS: It was, in substance, that Jesse, or Jesse Bosby had a girl friend by the name of Dolores who lived in Apartment 7, which was in his apartment building. I believe the address is 768 West Colden Avenue, Los Angeles.

And that Jesse's girl friend Dolores knew where Jesse actually lived.

And that on Friday, either early Friday morning or Friday afternoon, I believe he stated between 11:00 and 12:00 a.m., Friday, Jesse was at his apartment, and Jesse informed him that they could get, I believe, between six and seven thousand dollars at this one market. And it was Jesse's idea to rob this one particular market.

Jesse shortly after that left his apartment. The next time he saw Jesse was in the vicinity of 61st and Converse Avenue.

At that time Jesse was in the presence of a tall Negro [fol. 518] fellow and a tall white man. All four of them then drove to the vicinity of 60th and Converse Avenue in Mr. Cooper's vehicle, where he let Jesse Bosby and the tall colored man and the white man out.

Mr. Cooper then drove his own vehicle in or very close to the market at 62nd and Holmes Avenue, and when he walked into the market he saw either the tall colored man and a white man walking down towards the market or Jesse Bosby and the white man walking towards the market.

He went in shortly later and come back out to get his pay check, and when he walked back in, at that time the three other persons, Jesse Bosby, the white man, and the tall Negro fellow, walked in behind him.

He presented his check to the lady for cashing. He heard some type of rumbling in the back of the store and noticed Jesse slapping or hitting the old man.

And I believe he stated he heard something that sounded like a gunshot going off.

All four of them then ran from the store or left the store, got back into his own vehicle.

They left the area. I believe we asked him who was sitting in the various seats. I think he said Jesse was sitting in the front seat and the tall colored fellow and the white man were sitting in the back seat.

[fol. 519] After that he returned to his home.

We asked him for a description of the tall colored fellow. He said the tall colored man was somewhat taller

than he was, I believe in his late twenties, and I believe, wearing a leather jacket.

We asked for a description of the white man. He stated he was approximately thirty years old, five eleven, approximately 150 or 160 pounds.

We asked him if Jesse was armed or any of the persons were armed and I believe he stated Jesse had a gun and he described it as an octagonal barrel, pistol or revolver.

He also stated he observed Jesse go behind the cash register and attempt to open it but Jesse was unsuccessful in attempting to open the cash register and when he left the store he put the—excuse me, when all the commotion started in the rear portion of the store, the lady behind the cash register grabbed a revolver or a gun, and he took the gun away from the lady and put it in one of his front pockets and he didn't think the other persons that was in the vehicle with him realized or knew that he had the gun in his front pocket or the fact that he had taken the gun from the lady.

We asked him whose idea it was to either knock over the market or rob the market and he stated it was Jesse Bosby's idea.

[fol. 520] In substance, that was the conversation we had with him at that time.

Q BY MR. WARNBERG: All right. Then, after that did you then talk to Mr. Cooper and Bosby together?

A Yes, sir, we did.

Q This is after you went out and looked for the gun?

A Yes, sir, that is correct.

Q And when—now, when you talked to both of them together where were you then?

A Also at Firestone Sheriff's station in Room 115.

Q All right. Now, who was present with you then?

A Mr. Cooper, Mr. Bosby, Sergeant White, Sergeant Rowley and myself.

Q All right, and each defendant at all times spoke freely and voluntarily?

A Yes, sir, he did.

Q This will then be as to the defendants Bosby and Cooper; is that correct?

A Yes, sir, that is correct.

THE COURT: Ladies and gentlemen, this testimony will be received only as against the defendants Cooper and Bosby and not as against the other defendants in the case.

MR. MOORE: May we have the date and time, please?

MR. WARNBERG: I thought—

Q Would you give us the time?

[fol. 521] A It was at 8:42 p.m., December 12, 1964, Firestone Sheriff's station in Room 115.

Q What was the conversation?

A Mr. Cooper stated that on Friday morning, or Friday some time, that he and Jesse Bosby, the tall Negro fellow, and the white man had met at an apartment in Compton where they arranged or planned to rob this one particular market, and that Jesse Bosby had called him on the telephone and given him directions as to how to get to this one particular apartment in the City of Compton.

Mr. Cooper also stated that after the preparations for robbing this market had been made all four of them proceeded to the vicinity of 61st and Converse, that he and Mr. Bosby drove in his, Mr. Cooper's '56 Mercury, and the tall colored man and the white man rode to that location in the white man's green Ford.

MR. WALTON: Your Honor, is the witness reading? If he is, I would merely like to know what it is he is reading from.

THE COURT: What are you referring to, sir?

THE WITNESS: My original notes—excuse me, a copy of the report that my partners and I wrote regarding this interview. I am reading a portion of it and then testifying from memory from the rest of it.

Q BY MR. WARNBERG: Is it necessary to refresh your memory?

[fol. 522] A Yes, sir, in this case it is.

Q These were notes you made at the time?

A Well, this is a report written as a result of the notes we wrote at that time, yes, sir.

Q And they accurately reflect the conversation that you had at that time?

A Yes, sir, they do.

Q All right, go ahead.

A In substance that was the conversation we had with Mr. Cooper at that time in the presence of Mr. Bosby.

Q All right; then what did you say or what happened next?

A We had a conversation with Mr. Bosby, also.

Q In other words, this is still in the same room, they are together?

A Yes, sir, they are.

Q All right, go ahead.

A Mr. Bosby stated that he thought this person by the name of Charles lived on Arbutus Street in Compton, in a partially furnished apartment and that he had been to Charles' apartment on a Friday morning, December 11, 1964.

In substance that was a conversation we had with Mr. Bosby at that time.

Q All right.

Then what was the next thing you did in your investigation of this case?

[fol. 523] A My partner, Sergeant White, and I either took Mr. Cooper or Mr. Bosby to the City of Compton and two other officers, either took the other gentleman, either Mr. Cooper and Mr. Bosby, in another radio car to the City of Compton where Mr. Bosby directed us or the other two officers to an apartment—I believe it was 535 West Spruce Street, Apartment 7, I believe; and one of the defendants told us that this was the apartment that this tall Negro fellow lived in and that is where they were together Friday and that is where they made the arrangements to rob the market.

Q All right.

Did you see any other defendant at that location?

A No, sir.

THE COURT: Excuse me just a moment.

So the record will be perfectly clear, the statements just made by the officer with respect to what either Bosby or Cooper told him about the tall Negro fellow, where he lived, and so forth, will be received only as against the defendants Cooper and Bosby.

You don't know which one made the statement, sir?

THE WITNESS: When we took them to the scene, no, sir, I don't recall.

THE COURT: One of the two?

THE WITNESS: One of the two, yes, sir—excuse me, both of them made the statement, in their opinion this is where the person lived, and that was the particular apart-
[fol. 524] ment.

I don't recall which defendant was in our car or which defendant was in the other car, but both of them made the statement, that is where the man lived.

THE COURT: All right.

Those statements will be limited and received only as against the defendants Cooper and Bosby and not as against the other defendants, ladies and gentlemen.

Q BY MR. WARNBERG: All right.

Now, did you arrest the defendant Rhone?

A Yes, sir, I did.

Q Was that about the next investigation in the case?

A Yes, sir, in substance, it was.

Q Where did you arrest the defendant Rhone?

A In the Casa Blanca Bar, approximately 154 and Avalon Streets in the Gardena district.

Q What date was that?

A That would have been on December the 13th, 1964, I believe about 12:30 or 1:00 a.m.

Q I take it you had been directed to that location?

MR. GORDON: I object to any assumption.

THE COURT: Sustained.

Q BY MR. WARNBERG: All right, when you got to the Casa Blanca Bar what did you do?

[fol. 525] A I directed the various officers to take various positions surounding the bar and my partner and I, Sergeant White and Sergeant Rowley, entered the front door of the bar. We made a search of the bar for Mr.—a person by the name of Charles, whom we had identified at that time as George Rhone.

MR. GORDON: Just a moment; move to strike that as a conclusion.

THE COURT: That may go out, the jury is admonished to disregard it, that portion, "whom we had found out to be George Rhone."

THE WITNESS: We searched the premises and I observed Mr. Rhone sitting in the southwest corner of the bar in a—

Q BY MR. WARNBERG: Was he alone at that time?

A Yes, sir, he was, in a booth.

Q What did you do when you saw him there?

A I identified myself with my identification card or badge and asked Mr. Rhone to step outside. I asked him for his name and he gave me another name other than George Rhone, Jr.; I don't recall what the name was.

[fol. 526] I informed him that in my opinion his name was George Rhone and he was under arrest at that time for murder.

I placed the handcuffs on Mr. Rhone, advised him of his constitutional rights, which were, in substance, that he was under arrest for murder, he was not required to give a statement in this case, any statement he did make in this case would be used against him, he had a right to contact his attorney, and remain silent at all stages of the proceedings.

Q All right. Go ahead. What did you do?

A Mr. Rhone informed us that a person by the name of Glen, who was a white man, had just dropped him off at that bar a few minutes before this, and this person's vehicle was parked across the street.

Mr. Rhone at that time directed us across the street to a green '54 Ford two-door sedan.

He stated at that time that the car was registered under the name of James Larson, and that this name was a phony, and he knew it to be phony—

MR. WALTON: Excuse me. I move all of this be stricken.

THE COURT: The motion is denied.

Ladies and gentlemen, this testimony will be received only as against the Defendant Rhone and not as against any other defendant.

[fol. 527] THE WITNESS: He stated the person's name was Glen, the name James Larson was a phony—

MR. WALTON: Well, may we approach the bench so that I can make a motion, your Honor?

THE COURT: Yes.

(The following proceedings were had at the bench:)

MR. WALTON: I make a motion for a mistrial based upon the fact that the use of another name, assuming it to be a fact of the matter, has no relevance to this trial.

The officer has now repeated for this record the fact that Rhone supposedly said that Harrington was using the name James Larson, and that that name was a phony, which is hearsay upon hearsay.

And I don't feel that any limitation or instruction or admonition given by your Honor to the jury can effectively erase the kind of impression inevitably and indelibly made by that kind of testimony, and consequently move for a mistrial.

THE COURT: Denied.

(The following proceedings were had in open court in the presence of the jury:)

Q BY MR. WARNBERG: Where were you standing then?

A I believe—well, in regard to which portion—

Q Well, the last conversation, were you near the car [fol. 528] or where were you?

A Yes, sir. At that time we were standing, I believe, on the sidewalk paralleling the vehicle, a green '54 Ford.

Q All right. Go ahead with the conversation.

A At that time we informed Mr. Rhone that we were impounding the vehicle.

We opened the trunk of the vehicle, and upon searching the vehicle we discovered two suitcases, one of which Mr. Rhone informed us belonged to, I believe, himself, and stated the other one belonged to Mr. Harrington.

Searching—excuse me—Rhone used the word "Glen," I believe, at that time.

Upon searching the suitcase that Mr. Rhone informed us belonged to Glen, we found a .22 Sears & Roebuck revolver.

Q Let me show you People's Exhibit No. 7. Is that the one—

MR. WALTON: Your Honor, this is totally unanticipated. I feel there should be a hearing on this aspect of the case without the presence of the jury. And I honestly did not anticipate this development.

[fol. 529] THE COURT: We will have a short recess, ladies and gentlemen. I say short; I don't know how long it will be, I haven't the slightest idea. I just ask you to be patient.

Remember the admonition, please. Wait in the jury room.

(Jury leaves courtroom.)

THE COURT: The record may indicate the jury has left the courtroom.

I am interested, Mr. Walton. You say this is totally unexpected. I think Mr. Warnberg asked you in chambers if there was to be any question about probable cause. And you indicated to the Court that you did not know where this weapon was recovered?

MR. WALTON: I did not know, purportedly, that Rhone had said that it was Glen's suitcase. That is what I did not know.

Now, this is an unanticipated development, and I assure your Honor that it is.

THE COURT: All right. What did you want to go into?

MR. WALTON: The aspect of the search of the suitcase which purportedly was not Rhone's, even by the officer's own testimony.

THE COURT: All right

[fol. 530] VOIR DIRE EXAMINATION

BY MR. WALTON:

Q Now, Sergeant Vaughn, at the time that you arrested Rhone, did you have a search warrant for the automobile which was parked across the street?

A No, sir, we did not.

Q Did you make any effort to get a search warrant for the car?

A No, sir, we did not.

Q Did Rhone ever say to you that it was his car?

A No, sir.

Q Now, at the time that you were searching the car, Harrington was not in custody, as far as you knew, isn't that right?

A That is correct.

Q And it was your understanding, based upon information and facts then known to you, that the car belonged probably to Harrington or this person named Glen, is that correct?

A Yes, sir, that is correct.

Q And were you one of the officers who participated in the search of the car?

A Yes, sir.

Q Where were these two suitcases?

A In the trunk portion of the vehicle.

Q Were these suitcases locked or closed?

[fol. 531] A They were closed, yes, sir.

Q Were they locked?

A No, sir.

Q Was the trunk locked?

A I believe it was, yes, sir.

Q How did you get into the trunk?

A Mr. Rhone supplied us with a set of car keys.

Q Did you see where those keys came from?

A I believe Mr. Rhone's pockets, he gave them to us.

Q I see. Was he handcuffed at the time he gave them to you?

A Mr. Rhone?

Q Yes.

A Yes, sir.

Q Did you see some officer reach into his pocket and take the keys?

A No. I—I don't recall if one of the officers did, or Mr. Rhone took them from his pockets. I believe one of the officers did, Counsel.

Q Just reached in and took the keys, is that your present memory? Is that correct?

A Yes, sir, that is correct. I believe Mr. Rhone was handcuffed, his hands were cuffed behind his back. So I believe one of the officers did remove the keys.

Q Do you recall which officer that might have been?
[fol. 532] A Well, it would either be Sergeant Rowley, White, or myself. I do not recall.

Q Were you one of the officers who physically went into the trunk of the car?

A Yes, sir.

Q Were you one of those who opened the suitcase?

A Either I did or one of the other officers did. It was accomplished in my presence.

Q Now, prior to the time that you opened the suitcase, or participated in the opening of the suitcase in which that gun was found, Rhone had told you that that was Glen's suitcase, is that correct?

A Would you repeat that, Counsel?

Q Prior to the time that you went into the suitcase in which the gun was found, Rhone had told you it was Glen's suitcase, is that correct?

A I don't recall if he did prior to or while we were opening it or while we were searching it. I do not recall, Counsel.

But he did state that the suitcase belonged to the person by the name of Glen.

Q Did it happen in one of these two ways: Either he told you before that it was Glen's suitcase or else he made no statement at all and you just went into the suitcase without having any idea who it belonged to?

A No. He stated that it was Glen's suitcase. I don't [fol. 533] recall exactly at what moment it was, shortly prior to or during the time we opened the suitcase.

Q At no time did he tell you it was his suitcase, is that correct?

A That is correct.

[fol. 534] Q And this automobile was at some point across the street from the bar in which Rhone was arrested, is that correct?

A That is correct.

MR. WALTON: I have nothing further.

CROSS EXAMINATION

BY MR. WARNBERG:

Q Did you have some information on that car?

THE COURT: Wait. Is there an objection now?

MR. WALTON: I assumed he could cross examine. I do propose to make an objection, if the District Attorney—

THE COURT: If there is no objection, then there is nothing further to do. You object now to the testimony on the grounds of an unreasonable search. Then the burden is on the prosecution to go forward and show the basis of probable cause.

MR. WALTON: Yes. I certainly do object to all reference made to this gun, which is People's—

THE COURT: 7 for identification.

MR. WALTON: —People's 7 for identification, on the grounds that, first, the tangible evidence, the gun itself, and then all of the testimony predicated thereon has been the product of unreasonable and unlawful search.

THE COURT: Go ahead, Mr. Warnberg.

Q BY MR. WARNBERG: All right. Officer, let me [fol. 535] start out—before going to the location, you had some information about Defendant Rhone?

A Yes, sir, we did.

Q All right. What was your information about Defendant Rhone?

A That he was presently at the Casa Blanca Bar, and that he had called his sister, requesting her to bring some money to him at the Casa Blanca Bar so he could get out of town.

Q Did you talk to the sister?

A Yes, sir, we did.

Q When was that conversation?

A When was it?

Q Yes.

A That was shortly after midnight, probably around 12:15 a.m., on December the 13th, 1964, at her residence on West Spruce Street in the City of Compton.

Q What did she tell you?

A That she had received a phone call from her brother George, and she told her brother George to call back a few minutes later.

The phone call came in. She informed us that it was George on the telephone, and that George wanted her to bring some money to him to the Casa Blanca Bar so he could get out of town.

And we asked her if she would go to that bar with her [fol. 536] boy friend in her boy friend's vehicle, with a couple of officers in the back of the vehicle.

She agreed to do this for us.

Sergeant White and I did enter the vehicle. Her boy friend and Miss Rhone then drove us to the Casa Blanca Bar.

Q Did you notice that Ford there then?

A No, sir.

Q And I take it before you talked to her, you had information on the defendant Rhone from talking to the other defendants?

A Yes, sir. Not by the name of Rhone, however.

Q What was your information?

A His name was Charles, and that he lived in that one particular apartment where we were at the time we were talking to Miss Rhone. I believe the address is 535 West Spruce Street.

Q And then when you talked to that lady at that address is when you obtained the name George Rhone?

A Yes, sir, that is correct. And also from another gentleman at that address.

Q All right. Now, what was the information, if any, that you had on that '54 Ford?

A Just the information supplied to us by Mr. Rhone at the time he was under arrest; that the car he was transported to the Casa Blanca and/or the car that Glen [fol. 537] had let him use was parked across the street and he had the keys for it.

Q When you arrested him, you walked over to the car, is that it?

A That is correct.

Q All right. Now, I think we have gone into it once, but once again, what did he say about the car?

A He stated either Glen had driven him to that location in that vehicle or that Glen had loaned him that one particular vehicle. I don't recall which.

However, he did state that Glen left in a black Renault with his wife, who was a Japanese girl.

[fol. 538] Q Did you recognize at that time the name of Glen?

A No, sir.

Q You didn't know who Glen was then?

A No, sir.

Q All right; so, then the next thing you did was what?

A We took Mr. Rhone across the street and informed him we were impounding the vehicle; and we searched the vehicle.

That is when we found this one particular firearm, People's Exhibit 7, I believe, in one of the suitcases in the trunk portion of the vehicle.

Q At that time, well, you opened the trunk with a key?

A One of us did; I don't recall which one opened the trunk.

Q And when you opened the trunk the first thing you noticed was what? Two suitcases?

A Two suitcases and several other—I believe there was a spare tire in the trunk and several other items.

Q Were there any names on the suitcases?

A Not that I recall, no, sir.

Q So what did you do, you went right ahead and opened the suitcases?

A Well, we commenced to search the entire vehicle, and searching the suitcases was a portion of searching the [fol. 539] vehicle.

Q And do you recall where you found the weapon, People's 7?

A Amidst the various items of men's clothing, undershirts and shirt and socks; it was secreted between several of them.

Q In one of the suitcases, or where?

A Yes, sir, in one of the suitcases.

Q And then did you question the defendant Bosby about that, the gun?

A Mr. Rhone, we did, but—
Q Mr. Rhone, I am sorry.
A Yes, sir.
Q Right there?
A Yes, sir.

THE COURT: You are going into what happened after he got the gun. I am not interested in that at this point.

Officer, in questioning, you questioned Defendant Bosby, didn't you, before this particular incident about recovering the gun, People's 7 for identification?

THE WITNESS: Yes, sir, we did.

THE COURT: Didn't Bosby tell you at that time that there was a '54 Ford involved in the attempted robbery at 61st and Holmes?

THE WITNESS: Yes, sir, I believe he did; I believe it is a portion of his statement.

[fol. 540] THE COURT: You had that information when you were out there at the time, that you were arresting Rhone; is that correct?

THE WITNESS: Yes, sir, that is correct.

THE COURT: And you also knew at that time, as I gathered from the statements that have been read, that someone other than Rhone, Bosby and Cooper was involved in this affair; is that correct?

THE WITNESS: Yes, sir, that is correct.

THE COURT: Did you believe before you made the search of the '54 Ford that it might be the same car that was involved in the robbery?

THE WITNESS: Yes, sir, we did.

THE COURT: Anything further, Mr. Warnberg?

MR. WARNBERG: No, sir.

FURTHER VOIR DIRE EXAMINATION

BY MR. WALTON:

Q At the time you approached that Ford you had in mind Bosby's conversation about a Ford?

A In refreshing my memory I do recall the fact that a '54 Ford was mentioned by Mr. Bosby and another person that gave us information on a Ford product.

Q You mean, as you presently refresh your memory, you realize that you knew before you searched that car that a Ford might have been involved; is that what you are saying?

[fol. 541] A Yes, sir, that is correct.

MR. WALTON: I have nothing further.

THE COURT: The objection will be overruled. We will take a ten-minute recess.

(Recess.)

[fol. 542] (The following proceedings were had in open court in the presence of the jury:)

THE COURT: You are still under oath, sir. State your name again for the record.

THE WITNESS: Charles William Vaughn.

DIRECT EXAMINATION (Continued)

BY MR. WARNBERG:

Q Mr. Vaughn, let me show you People's No. 7. Is that the gun you had reference to?

A Yes, sir, it is.

Q Is that the gun you found in the trunk of that car, the Ford car at the location that you just referred to?

A Yes, it is.

Q In what condition was the gun then?

A I believe it was loaded with either eight or nine live rounds of .22 ammunition.

Q I notice there is a container attached to the exhibit. Would you look at the envelope and see if those are the bullets that were in the weapon.

A Somebody did a magnificent job of sealing this thing.

Q Can I help you?

A They appear to be similar characteristic and type, yes, sir.

[fol. 543] Q How many do you have there?

MR. GORDON: I am unable to hear down here.

THE COURT: Please pull the mike back to you.

THE WITNESS: They appear to be the same type and characteristics.

There are nine.

Q BY MR. WARNBERG: Were there nine of them in the weapon?

A As I recall, it was either eight or nine.

MR. WARNBERG: May these bullets, your Honor, attached to the exhibit, be part of People's Exhibit 7?

THE COURT: Marked 7-A for identification.

Q BY MR. WARNBERG: All right, sir, after you found the gun what did you do?

A There was a conversation with Mr. Rhone, a brief conversation as to who Glen was at that time.

Q What was said?

THE COURT: This will be received only as against the Defendant Rhone, ladies and gentlemen, not as against any other defendant.

MR. WALTON: Your Honor, I would object on the ground it appears to be not admissible even against the Defendant Rhone.

THE COURT: Overruled.

THE WITNESS: In substance that Mr. Rhone had just dropped Glen off at the Horseshoe Club in Gardena, [fol. 544] where his wife, a Japanese girl, was; and this Japanese girl lived in the vicinity of the Baldwin Theatre on Crenshaw Boulevard.

I believe in substance that was the conversation we had at that location with Mr. Rhone.

Q BY MR. WARNBERG: Where did you go?

A We returned to Firestone Station, where we booked Mr. Rhone.

Q And then did you, after that, take a formal statement of the Defendant Rhone?

A Yes, sir, we did.

Q Do you recall when you did that?

A That was approximately 4:20 p.m. on December the 13th, 1964, at Firestone Station.

Q And was a stenographic reporter present with you at that time?

A Yes, sir.

Q And as the conversation was had with the Defendant Rhone she took it down at the same time?

A The reporter did; I don't know if it was Mr. St. Thomas or one of the lady reporters.

Q Let me show you a document of 21 pages that is headed "Statement of George Rhone, Jr.," and I will show you that document and ask you if that fairly reflects the conversation you had with the Defendant Rhone at that time.

A Yes, sir, it does.

[fol. 545] Q And did the Defendant Rhone at all times speak freely and voluntarily?

A Yes, sir, he did.

Q Was there anyone else there beside you and Defendant Rhone and the stenographic reporter?

A Sergeant Harold White of the Homicide Detail and Sergeant Gerald Rowley of the Firestone Station Detective Bureau.

Q To relate the conversation verbatim is it necessary for you to read it?

A Yes, sir, it is.

THE COURT: Ladies and gentlemen, this will be received as against the Defendant Rhone, only, not as against any other defendant.

THE WITNESS: (Reading:)

> "Statement of: George Rhone, Jr., taken at 4:40 p.m. on Sunday, December 13, 1964, at the Los Angeles County Sheriff's Firestone Station, located at 7901 South Compton Avenue, Los Angeles, California, in the presence of Sergeant C. W. Vaughn and Sergeant H. W. White of the Homicide Detail, Los Angeles County Sheriff's Department Detective Bureau, and Sergeant G. Rowley of the Los Angeles County Sheriff's Firestone Station Detective Bureau."

MR. GORDON: Your Honor, I object to lines 4 and 5 on the grounds that they are immaterial to the statement.

[fol. 546] THE COURT: They may be deleted; objection sustained.

THE WITNESS: (Reading:)

"Reported by Harold St. Thomas, stenographic reporter, Los Angeles County Sheriff's Department Detective Bureau.

"BY SGT. VAUGHN:

"Q Mr. Rhone, will you state your full name, please? You will have to talk loud enough so this gentleman over here can hear you.

"A Wait a minute. Before I say anything, I want to ask you a question.

[fol. 547] "BY SGT. VAUGHN: Sure, go ahead.

"BY SGT. WHITE: Do you want him to stop?

"A Yes.

"(Off the record. Statement resumed at 4:45 p.m.)

"BY SGT. VAUGHN: Q Previously, Mr. Rhone, we advised you of your constitutional rights and the fact that you are not required to converse with us pertaining to this case, make any comments, you would have a right to your attorney and to remain silent throughout the entire interview, and that any statements you may make pertaining to this case may be used in court against you. You understand that?

"A Yeah.

"Q At this time are you willing to converse with us regarding the case in question?

"A Yeah.

"Q Are you familiar with the persons known as Jesse Bosby, Gilbert Cooper and Glen Martin Harrington?

"A Yes.

"Q All right. I show you a picture of a male Caucasian. Can you tell me who this person is?

"A It's Glen.

"Q And do you know him by any other name?

[fol. 548] "A No.

"Q Do you know him by the name of James Larson?

"A I know him by James Larson, yeah.

"Q I show you another picture of a male Negro. I ask you if you recognize this gentleman?

"A Yeah.

"Q And who is this person?

"A That's Jesse.

"Q Do you know Jesse's last name?

"A Bosby.

"Q And you are familiar with a person known as Gilbert Cooper?

"A Right."

Excuse me, your Honor, was lines 10 through 17 admitted?

MR. WARNBERG: I don't believe—

THE COURT: No, you may read it.

THE WITNESS: Thank you. (Continuing reading:)

"Now, this interview today pertains to the robbery and shooting at Robbins' market, 6126 South Holmes Avenue, Los Angeles, on Friday, December 11, 1964, approximately 2:30 p.m.

"Did you and the previous persons I just mentioned get together some place Friday and discuss, or have a conversation pertaining to possibly robbing this [fol. 549] market?

"A Yes.

"Q And approximately what time was that?

"A About 12:00 noon, somewhere around there.

"Q And where was this at?

"A It was in Compton.

"Q Would that be at your sister's residence, 525 West Spruce Street, Compton City, or in that vicinity?

"A Yes.

"Q Who was present, other than yourself?

"A These three guys you just showed me there, Glen, Jesse, and this other guy, Gil.

"Q That would be Jesse Bosby, Gilbert Cooper and Glen Harrington?

"A Right.

"Q Now, in substance, what was said between the four of you regarding this market?

"(No answer.)

"Q Was there some type of conversation about going up to a market on Holmes Avenue and knocking it over?

"A Yeah.

"Q Whose idea was this?

"A It was Jesse's.

"Q Did Jesse lay out the plans?

[fol. 550] "A Yeah.

"Q To knock over this market?

"A Yeah.

"Q Was there an agreement between the four of you to be armed during this market job?

"A No.

"Q Who was to go in the market first?

"(No answer.)

"Q Were you to go in the market first, yourself?

"A No.

"Q Was Jesse Bosby or Gilbert Cooper to go in the market first, or this white fellow known as Glen Harrington?

"(No answer.)

"Q Do you recall or are you just a little afraid or worried at this time to say who was to go in first?

"A I don't know what I should say.

"Q Just say the truth, if you so desire.

"A (No answer.)

"Q Well, was there some conversation as to who was going in first?

"A Yes.

"Q And for that reason—"

THE COURT: No.

THE WITNESS: Excuse me. (Continuing reading:)

[fol. 551] "Q And for what reason was this person to go in first?

"A Try to cash a check.

"Q All right. Now, who tried to cash a check at the check stand?

"A This Gil guy.

"Q Gilbert Cooper went in first to cash the check?

"A Yeah.

"Q All right. Now, while you were down in Compton, was there some type of talk as to how much money you anticipated getting out of this market?

"A Yeah, it was mentioned.

"Q And how much was mentioned?

"A Five or six thousand dollars.

"Q And how much money did you or any of you or all of you obtain from this market?

"A None.

"Q Was there any plan as to how you were to divide up the money after it was obtained?

"A No.

"Q What did all four of you do after you left the Spruce Street address in Compton regarding going to the market?

"A We went down in two separate cars.

"Q All right. Which car did you go down in?

[fol. 552] "A Glen's car.

"Q And what type of vehicle is that?

"A It's a '52 Ford.

"Q Would that be a light or white color over a dark green, '52 Ford hard top?

"A Yeah.

"Q And was that the vehicle that the officers impounded last night?

"A Yeah.

"Q You and Glen went some place in this car to the vicinity of the market?

"A Right.

"Q Do you recall exactly where you parked near the market?

"A Couldn't say exactly.

"Q Well, approximately how many blocks east or west or north or south did you park?

"A Well, a block north and two blocks, maybe three blocks west from the place.

"Q Was Glen Harrington driving his own car?

"A From where?

"Q From the Compton address to the market address?

"A Yeah.

"Q When you left the Spruce Street address, did you see Gilbert Cooper and Jesse Bosby get into some [fol. 553] type of vehicle?

"A Yeah.

"Q What type of vehicle did they get into?

"A I think it was a '55 or '56 Mercury.

"Q Do you recall the color?

"A It was green.

"Q Solid green or otherwise?

"A It was green and white.

"Q Green and white; a two-door or four-door model?

"A It was four-door.

"Q And did they follow directly behind you to the vicinity of the market?

"A No.

"Q And approximately what time did you meet Cooper and Bosby near the market?

"A I couldn't say what time it was.

"Q Well, after you left the Spruce Street address in Compton, where did you and Glen Harrington drive to?

"A We drove to the vicinity of the market.

"Q And where did Glen get his piece of artillery?

"A I don't know.

"Q Did you have a piece of artillery Friday afternoon, yourself?

[fol. 554] "A No.

"Q All right, when you were in Compton, did Bosby or Cooper say anything about having some artillery?

"A Yes.

"Q What was said by whom? In substance, that is.

"A I don't know who said it, but somebody just said, 'I got a piece,' and Glen said, 'Well, I got one, too.' And that's all that was said.

"Q That is, someone said he had a piece and Glen said he had one, too?

"A Yeah.

"Q And this first person that made the conversation, was that between Cooper and Bosby?

"A Right.

"Q One of them had a piece and Glen jumped up and said, 'I have one, too'?

"A Right.

"Q All right, when you met near the market with Bosby and Cooper, what was said at that time?

"A There was nothing to be said there.

"Q Did anybody say at that time time who was to go in first?

"A No, that was already arranged.

"Q And what were your duties regarding this [fol. 555] market job?

"A I was supposed to watch.

"Q And where were you to watch? From the inside of the market or the outside?

"A From the inside.

"Q And who were you to watch?

"A Well, it wasn't positive who was going to be there so I was just supposed to watch.

"Q When you first walked in the market, where were the two market clerks in relation to the cash register, which was on the northwest corner of the building?

"A They were standing together behind the counter, right in front of the cash register.

"Q All right, did you see another, older market clerk in there at that time?

"A No.

"Q At a later time did you see this person?

"A Yes.

"Q All right, when you walked in where was Jesse Bosby?

"A He was standing in front of the meat counter, I believe.

"Q All right, where was Gilbert Cooper and Glen Harrington?

"A Well, they were standing in front of the cash
[fol. 556] register.
"Q Were you the second or third man in the place?
"A I was the last man in the place.
"Q Who was the second man in?
"A (No answer.)
"Q Who was the first man in?
"A Gil.
"Q And you were the last man?
"A Yeah.
"Q Did Glen go in just before you?
"A We sort of went in together.
"Q That would leave Jesse going in second?
"A Right.
"Q All right, you were standing by the front door looking towards the cash register, and did something take place at that time?
"A Well, yeah, there was a scuffle.
"Q All right, between who?
"A Between Jesse and another fellow, older fellow. He happened to appear. I don't know where he come from.
"Q About how old was this person Jesse had a scuffle with?
"A I'm not sure. I couldn't say.
"Q Did he appear to be a market employee?
[fol. 557] "A Yes.
"Q Did he have a white apron on?
"A Yes.
"Q White shirt?
"A Yes.
"Q All right, where was this scuffle held?
"A It was right near the meat counter.
"Q Well, what did Jesse do in the scuffle?
"A Well, I couldn't see exactly what he did in the scuffle because I was watching, like I said. All I knew is they was scuffling back there.
"Q Did either one of them hit each other?
"A Yeah, well, they was throwing cans and everything.

"Q Did this old man say anything to Jesse?
"A Not that I could hear.
"Q Did Jesse say anything to the older man?
"A No.
"Q Where were you standing when the scuffle was going on?
"A I was standing right at the door there.
"Q All right.
"A Just inside the door.
"Q Where was Gilbert Cooper and Glen Harrington standing?
"A Glen was standing next to me and Gil was
[fol. 558] standing next to him.
"Q And you were closest to the door?
"A Right.
"Q And then Glen Harrington was on your right-hand side and Gilbert Cooper on the extreme right-hand side?
"A Right.
"Q All right, this was right in front of the cash register?
"A Right.
"Q All right, now, at that time, during the time that the scuffle was going on, did you go to the rear of the store for any purpose at all?
"A No.
"Q Who was the person that was at the rear of the store, between the four of you fellows?
"A I think that's Jesse, was the farthest to the rear.
"Q Jesse was the only person to the rear of the store?
"A He was the farthest to the rear. Gil, the way it was, as I said, he wasn't too far from the rear either.
"Q When the scuffle was going on did this lady at the cash register stand, did she pull out a gun of some sort?
[fol. 559] "A Yeah.
"Q And what happened at that time?

"A Well, she pulled the gun. I could see that she was going to shoot at Jesse because she didn't know if we were together or not, because no other guns were in sight at the time. And when she reached for the gun and she whirled towards Jesse, and when she did, I grabbed her arm and Gil grabbed the gun out of her hand.

"Q You grabbed her arm?

"A Right.

"Q Which hand was the gun in? I mean, which hand did this lady have the gun in?

"A In her right.

"Q In her right hand?

"A Right.

"Q And you grabbed her right hand or right wrist?

"A Right wrist.

"Q With which hand?

"A My left.

"Q And what did Gilbert Cooper do?

"A When I grabbed the gun I held it down so if it did fire it would fire on the ground, and he grabbed it out of her hand.

"Q Which hand did he use?

[fol. 560] "A I don't know.

"Q Did you see Cooper grab the lady by the throat?

"A No.

[fol. 561] "Q What did Cooper do with the gun?

"A I don't know anything about that, either. I didn't see it no more after that.

"Q Did this lady fire the gun at Jesse?

"A No.

"Q Did anyone fire the gun at Jesse?

"A No.

"Q Did she fire the gun at any of you?

"A No, she didn't have a chance.

"Q And what did Cooper do with the gun after that?

"A I don't know what happened

"Q Sometime right after Cooper took the gun from the lady, did you hear a shot ring out?

"A Yes.

"Q Where were you standing at that time?

"A I was still in the same position at the cash register.

"Q Directly in front of the cash register?

"A Yeah.

"Q And where was Glen Harrington?

"A He was next to me.

"Q About how far?

"A Oh,—

"Q Within a foot or two?

"A Yes, pretty close.

[fol. 562] "Q How about Gilbert Cooper?

"A I'd say he was maybe at the end of the counter between—well, he was probably between the counter and the meat.

"Q Delicatessen counter?

"A Yeah.

"Q All right, where was Jesse at this time?

"(No answer.)

"Q Was he at the front of the store or the back of the store?

"A He was at the back.

"Q How far back was he?

"A I couldn't be too sure how far he was.

"Q Where was the older clerk in the store at that time, at the time you heard the shot go out?

"A He was in the rear.

"Q He was in the rear?

"A Yeah.

"Q Was he standing in the aisle in front of the delicatessen counter or behind it?

"A I think he was behind it.

"Q And which way was he facing? Towards the back of the store or towards the front of the store?

"A He was facing the back.

"Q He was facing the back. And where was
[fol. 563] "Jesse facing, in which direction was Jesse facing?

"A I still couldn't be too sure; east or west or north—I couldn't be sure.

"Q But at the time the shot rang out, you saw Jesse and the old man stumble?

"A Yes.

"Q Towards the rear of the store, behind the deli stand?

"A Right.

"Q And the old man, the clerk, was facing east; he had his back towards you?

"A Yes.

"Q All right. At the time the shot rang out, you, Cooper and Harrington were at the front of the store, along with the two other clerks behind the cash register?

"A That's right.

"Q What was said and done at the time the shot rang out? What did you four people do at that time?

"A That's hard to say because everybody was just running around.

"Q Did Harrington have his gun out at this time?

"A I couldn't notice if he did or not.

"Q Did Harrington have his gun out at any time
[fol. 564] "during this market job?

"A Harrington—wait a minute. I'm kind of mixed up.

"Q Glen. Did you see Glen have his gun out at any time?

"A No.

"Q Did you see Jesse have his gun out at any time?

"A Yes.

"Q When did you see Jesse have his gun out?

"A When the scuffle first started.

"Q All right. What was Jesse doing with his gun?

"A I think he was hitting him with it.

"Q On what part of the body was Jesse hitting the clerk?

"A The upper part.
"Q Towards the face and neck and shoulders?
"A Yes.
"Q How many times did you see Jesse hit the old man?
"A Well, I couldn't just see; it was off-glance-like I see him hitting him. I don't know how many times or what.
"Q How long a gun was this that Jesse had?"

[fol. 565] THE COURT: Pardon me. Would you like a little relief, Mr. Vaughn?

THE WITNESS: Oh, no. I had six hours sleep last night. I'm in good shape.

THE COURT: All right, go ahead.

THE WITNESS: Does my testimony indicate I need it?

THE COURT: No, no. I'm just trying to be considerate.

THE WITNESS: Mr. Warnberg is my afternoon relief.

(Continuing reading:)

"Q How long a gun was this that Jesse had?
"A I don't know how long it was. Oh, maybe this long.
"Q Indicating approximately six or eight inches in over-all length?
"A Yes.
"Q Do you know what caliber of gun it was?
"A No.
"Q Do you know what color it was?
"(No answer.)
"Q Was it a dark metal or highly polished like chrome or nickel?
"A It wasn't dark, but it wasn't highly polished. It was kind of light.
"Q Highly worn gun?
"A Yeah.

[fol. 566] "Q About how long was the barrel of the weapon?

"A Oh, maybe three or four inches, something.
"Q Who actually owns the gun?
"A I don't know who owns it.
"Q Have you ever seen this gun before?
"A It's the first time.
"Q Did Bosby say where he acquired the gun?
"A No.
"Q Did you see the old man fall to the floor of the market after the shooting?
"A I saw him stumble and fall, but he got up and started running again.
"Q Where was he when he stumbled and fell?
"A In between the meat counter and the cashier's counter there, right between where you walk in.
"Q And he stumbled and fell at that time?
"A Yes.
"Q You say he got up again?
"A Yes.
"Q And what did he do at that time?
"A He just started running around like he didn't —I mean, he didn't know where he was going or what he was doing.
"Q Did he knock over anything?
[fol. 567] "A Yes.
"Q What did he knock over?
"A I don't know.
"Q Did you hear a glass or bottle break during this scuffle?
"A Yes.
"Q How did it get broken?
"A I'm not sure just how it got broken. I know he had a bottle in his hand and he threw a couple of cans and everything.
"Q Who went over and tried to get into the cash register?
"A Jesse and this other guy.
"Q And Glen?
"A No.
"Q Gilbert Cooper?
"A Yeah.

"Q What did they do when they got over to the cash register?

"A Well, there was such a panic at that time, and they just hit it, were going to try to open it and pull the drawer open, but it wouldn't come.

"Q What did they hit it with?

"A Their hand.

"Q They didn't get it open?

[fol. 568] "A No.

"Q Did they get anything else in the market, such as wine or a pint of whiskey or anything?

"A No.

"Q What happened after that?

"A We all ran out.

"Q Did you see where the male clerk and female clerk disappeared to?

"A Everybody ran to the back and to the rear of the store. They were out of sight.

"Q Did you see the old man finally fall down?

"A He was out of sight, too. I figured he was in the back.

"Q When you ran from the store, where did you run to?

"A I ran for my car.

"Q Whose car?

"A The Mercury, the guy's Mercury.

"Q The one that belonged to Gilbert Cooper?

"A Right.

"Q All right. Where was that parked?

"A It was in front of the store.

"Q Facing north?

"A Yes.

"Q About how far in front of the store was it,

[fol. 569] "or how far north of the store was it?

"A Oh, maybe 25 feet.

"Q All right. What part of the car did you get into?

"A The rear.

"Q The driver's side or passenger's side?

"A Passenger's side.

[fol. 570] "Q Who was driving?
"A What's his name—
"Q Cooper, the owner?
"A Cooper.
"Q Who was in front with Cooper?
"A Jesse.
"Q And Glen was in the back?
"A Right.
"Q Is Glen part Negro or is he all white?
"A He's all white.
"Q Now, where did you fellows go at that time?
"A We drove two blocks north and then we turned left.
"Q All right, when you went two blocks north, did you stop for any reason?
"A No.
"Q Did you see a red traffic light there?
"A Yes.
"Q Was it red or green?
"A It was red.
"Q What happened at that time?
"A We just went through it.
"Q And you turned which way?
"A We turned west.
"Q That would be left. And how far did you drive
[fol. 571] to the west?
"A About three blocks.
"Q And what happened then?
"A We turned left again.
"Q And how far north did you go?
"A Oh, maybe, maybe a block, a little more.
"Q You stopped for a specific reason?
"A Yes.
"Q What was the reason?
"A To get into the other car.
"Q Who did this other car belong to?
"A It belongs to Glen.
"Q What type of vehicle was it?
"A It's a '52 Ford.
"Q The same one that the officers impounded at the time you were arrested?

"A Right.

"Q And [redacted] got out of the car belonging to Cooper?

"A Jesse, Glen and myself.

"Q And what happened to Cooper at this time?

"A He finally—suddenly decided to drive his own car away.

"Q Well, after all four of you got back in Cooper's car and were going back over towards the '52 Ford that was parked, what was the conversation between
[fol. 572] the four of you?

"A There was no conversation then.

"Q There were no words spoken between the four of you?

"A No.

"Q None whatsoever?

"A No.

"Q Who did you see have a piece of artillery in the car at that time?

"A I didn't notice if anybody had anything at that time.

"Q All right. Where was Glen's car parked when the three of you jumped into it?

"A (No answer.)

"Q Was it parked on the east side or west side of the street?

"A It was on the west side.

"Q Parked in a normal position?

"A Right.

"Q Was it close to an intersection?

"A No, I wouldn't say it was close.

"Q Parked in the middle of the block?

"A Yes.

"Q All right, who was the person that was standing by, or sitting behind the steering wheel when the three of you got out of Cooper's car? What's that
[fol. 573] person's name?

"A What person?

"Q The person that drove you away. Glen didn't drive his car away, and there were four of you in Glen's car. What was the fourth man's name?

"A You say Glen didn't drive his car away?
"Q That's what I understand.
"A Yeah, he drove it away.
"Q Who was the fourth man?
"A (No answer.)
"Q What did you fellows do after you left?
"A What do you mean, after we left?
"Q After you left the area where you jumped into the car belonging to Glen? Where did you fellows go?
"A I couldn't be sure because we all laid down.
"Q And Glen was doing the driving?
"A Yes.
"Q Did you go right back to your house?
"A Right.
"Q On Spruce Street?
"A Yes.
"Q And what was said while you were enroute to Spruce Street?
"A I don't know. I can't—I don't know.
[fol. 574] "Q Where did you stay that night?
"A I stayed in Pasadena.
"Q Where at?
"A At a motel.
"Q Which one?
"A Manwell's, M-a-n-w-e-l-l-'-s.
"Q And what street are they located on?
"A On Lincoln.
"Q Who stayed there at the motel with you?
"A Jesse and Glen.
"Q What time did you arrive at the motel?
"A It was early in the morning, maybe 3:30, 4:00 o'clock, something like that.
"Q Well, when you went back to your apartment there on Spruce Street, did you hear anything on the radio about this robbery and shooting?
"A Yes.
"Q What did you hear?
"A We heard that the old man was dead.
"Q What else?
"A (No answer.)

"Q Well, what time did you leave your apartment?

"A Oh, about 4:00 o'clock, 4:30, 5:00 o'clock, something like that.

"Q Who did you leave with?

[fol. 575] "A Jesse.

"Q Where was Glen at this time?

"A He stayed behind for awhile.

"Q Did you leave in Jesse's car?

"A In Glen's car.

"Q In Glen's car? And Glen stayed behind in your apartment? Where did you and Jesse go?

"A We didn't go any place in particular. We just rode for awhile, all over.

"Q All right, did you meet Jesse and Glen later on that evening or did you stay together all the time after the market job?

"A Me and Jesse met Glen later on that afternoon.

"Q Where at?

"A I can't say.

"Q You can't say because you don't know, or you don't desire to tell us?

"A I don't desire to tell you.

"Q But you and Jesse met Glen some place else that night.

"A Right.

"Q All right, whose car were you driving at that time?

"A Glen's.

"Q And how was Glen getting around?

[fol. 576] "A Cab.

"Q In a cab?

Where was Gil Cooper at this time?

"A I don't know.

"Q Well, after you met Glen some place where did all three of you go?

"A We went to Pasadena.

"Q And approximately what time of the night did you three meet?

"A It was the early part, about 6:30, 7:30, something like that.

"Q You drove straight to Manwell's Motel in Pasadena?

"A No.

"Q Where did you go in Pasadena?

"A We drove to several different places. We didn't go any place in particular. But I know some people there.

"Q What time did you get at Manwell's Motel?

"A It was about 3:30, 4:00 o'clock in the morning.

"Q How long did you stay there?

"A Till about 8:00 o'clock.

"Q A.M. or P.M.?

"A A.M.

"Q Where did you go after that?

[fol. 577] "A Came back to Los Angeles.

"Q Last night when the officers arrested you at 153rd and Avalon, there was a .22 revolver in a suitcase in the back of the vehicle that you say belonged to Glen. Who does this .22 belong to?

"A It belongs to Glen.

"Q The fellow that was with you on the market job?

"A Yes."

THE COURT: Page 18, sir, line 6.

THE WITNESS: Thank you. (Continuing reading:)

"Q At any time while you were inside this market, did you have a gun of any type in your possession, or in your hand?

"A Yeah, I had one.

"Q What kind did you have?

"A I had a .22

"Q Would that be the same .22 that the officers recovered last night?

"A Right.

"Q Was it fully loaded as it was when it was recovered?

"A Right.

"Q Did you shoot the clerk in the market Friday afternoon?

"A I wouldn't shoot anybody.

[fol. 578] "Q Did you see anybody shoot the clerk?

"A No.

"BY SGT. VAUGHN: Sergeant White, I have no other questions. Do you?

"BY SGT. WHITE: Q George, was Glen armed in that market?

"A He was for a while.

"Q What did he have?

"A He had a .22.

"Q And he gave it to you?

"A I took it because—I took it because this broad grabbed this stud and he seemed to, you know—

"Q In other words, you took it when the scuffling started and you saw that girl go for the gun, is that right?

"A Yes.

"Q And what was your intention to do with that gun when you took it from Glen?

"A I was to scare her so she wouldn't shoot anybody, that's what.

[fol. 579] "Q Okay, fine. Now, in talking to Jesse, he tells us that you took the gun from him after this thing went down and broke it in pieces. Is that true?

"A That I took the gun?

"Q The gun that Jesse used. Is that true?

"A No.

"Q What happened to that gun?

"A Jesse told you that I took it?

"Q Mm-hmm. What happened to that gun, do you know?

"A Will you hold it up on that thing?

"BY SGT. WHITE: Yes, I'll hold it.

"(Off the record at 5:30 p.m. Statement resumed at 5:40 p.m.)

"BY SGT. WHITE:

"Q All right. I want to show you another weapon here that appears to be a J. C. Higgins, Model 88,

.22 caliber, 9-shot revolver, serial number 583881, that has a four-and-a-half inch barrel, brown plastic grips, a blue steel barrel and a Parkerized frame. Do you recognize this gun?

"A Yes.

"Q How do you recognize it?

"A That's the gun.

"Q This is the gun that belongs to Glen?

[fol. 580] "A Right.

"Q Correction. I think I have the wrong serial number on this. Also, we noticed on this, the front sight is missing on the gun. And the correction on the serial number, it is 781536.

"BY SGT. ROWLEY:

"Q Is that the gun that Glen had in the market and the one that you took from Glen in the market and had in there?

"A Right.

"Q When you went to the Manwell's Motel in Pasadena, the three of you, you, Glen and Jesse, how long did you stay there, approximately?

"A Stayed there from—well, it was about three or four, maybe five hours; not over five.

"Q Why did you stay there that time.

"(No answer.)

"Q Well, why did you stay there for only three or four hours in the motel and then leave?

"A Because we needed money to get away. Sleeping in a motel wouldn't get us nowhere.

"BY SGT. VAUGHN:

"Q Did Jesse say how he knew or was aware the market had four or five thousand dollars in it?

"A Yes."

THE COURT: Excuse me, sir. Do you want to re-

[fol. 581] read that question, please.

THE WITNESS: (Continuing reading:)

"Q Did Jesse say how he knew, or was aware the market had four or five or six thousand dollars in it?

"A Yes.

"Q What were his comments about that amount of money?

"A Well, that he had been in the market a couple of times, and I think he said he used to cash checks there.

"He said one time he went in with a friend of his and this friend cashed a check, and he seen this lady go to the rear of the store and bring out a big bundle of money.

"Q Did you or any of your companions that were involved in this case go to the market prior to the robbery to look it over to see if it was okay?

"A As far as me and Glen is concerned, we—it was the first time we ever seen it.

"Q How about Jesse? Did he say he'd been up to the market and looked it over?

"A Yeah.

"Q What did he tell you about that?

"A You mean, that he looked it over that same [fol. 582] "day?

"Q Right, or the day before?

"A I think he did mention he did look it over that day.

"Q What did he say about it?

"A He said that 'She's been to the bank already, the money should be there.'

"Q Where were you gentlemen at that time, when he made that statement?

"A At the apartment.

"BY SGT. WHITE:

"Q Yes. When he said that 'She's been to the bank already, the money should be there,' did he know what time she ordinarily went to the bank?

"A I would say that he knew that. She already had been to the bank.

"Q And did he say how he knew that she had been to the bank?

"A No, but he had been over there that morning. He must have seen her or something.

"Q How were you to split this money up?
"A That wasn't even mentioned.
"Q George, since your arrest about 1:00 o'clock this morning down at the—was it Casablanca?
"A Yes.
[fol. 583] "Q 153rd and Avalon?
"A Yes.
"Q And how you been treated?
"A Okay.
"Q Has anyone used any force or threats of force or violence upon your person to get you to make this statement?
"A No.
"Q Has anybody made you any promises of reward or immunity to get you to make this statement?
"A No.
"Q Has this statement been made of your own free will and accord?
"A Yes.
"Q Has everything that you have told us in this statement been the truth, to the best of your knowledge?
"A Yes.
"BY SGT. WHITE: We'll close it at 5:45 p.m."

THE COURT: Ladies and gentlemen, during the course of the reading of some of these statements there were certain portions which were deleted; very few, but there were some.

I want to admonish you at this time that you are not to speculate as to what might have been contained in those deletions. It's not to be any concern of yours whatsoever. [fol. 584] You are not to draw any inferences pro or con with respect to that.

We will recess at this time until 1:45.

(Whereupon the noon recess was taken at 11:54 o'clock a.m. until 1:45 o'clock p.m. of the same day.)

[fol. 585] LOS ANGELES, CALIFORNIA,
THURSDAY, JUNE 24, 1965 1:50 PM

THE COURT: All right, Mr. Warnberg, you may proceed.

MR. WARNBERG: Thank you. Mr. Vaughn, will you resume the stand.

CHARLES WILLIAM VAUGHN,

called as a witness by and on behalf of the People, having been previously duly sworn, resumed the stand and testified further as follows:

THE CLERK: You are still under oath, sir. Will you state your name for the record, please.

THE WITNESS: Charles William Vaughn.

DIRECT EXAMINATION (Continued)

BY MR. WARNBERG:

Q All right, [redacted] Vaughn, you then completed your conversation with Defendant Rhone, is that correct?

A Yes, that is correct.

Q All right. Now, what was your next investigation in this case?

A Sergeant Harold White and myself proceeded to the West Valley Station on December the 15th, 1964, arriving at approximately 8:00 p.m. At approximately 8:30 p.m. we took Mr. Harrington into custody.

Q All right. Then that's the first time you saw [fol. 586] him?

A Yes, sir, that is correct.

Q That is the Defendant Harrington in this case?

A Yes, sir.

Q All right. Now, what did you do?

A We informed Mr. Harrington that we had a warrant for him charging him with one count of murder and that we were taking him to the Firestone Station for booking and processing.

We left the West Valley Station between 8:30 and approximately 8:45 p.m.

En route to Firestone Station we informed Mr. Harrington of his constitutional rights, which were, in substance, that he was not required to give us a statement in this case; any statement he did give would probably be used in court against him; he had a right to remain silent, and a right to contact an attorney and have this attorney at all stages.

[fol. 587] Q All right.

Did he say something? Did you keep talking or what happened?

A Yes, sir, we had a conversation with him, which was, in substance—

Q Were you still in the car?

A Yes, sir; Mr. Harrington and I were in the back seat of the car and Sergeant Harold White was driving the police vehicle.

Q And Defendant Harrington spoke freely and voluntarily at all times?

A Yes, sir, he did.

Q This is as to the defendant Harrington?

A Yes, sir, that is correct.

THE COURT: This is to be received as to Defendant Harrington only, ladies and gentlemen, and not as to any other defendant.

THE WITNESS: Mr. Harrington stated that last Friday, or on a Friday he had met these three other colored persons and that they had went to a market down in the Los Angeles area and these three colored fellows had went into the market and that he stayed in the car. Since he was out of cigarettes, he walked into the market with thirty cents in his hand and Mr. Harrington stated, "That is when it all started," or words to that effect; and they all ran out of the market or liquor store and left the scene, [fol. 588] leaving in a vehicle.

I believe, also, enroute to Firestone station he informed us that later that night he, and I believe he just used the word "Jesse and Rhone," went to a motel in Pasadena, arriving at approximately 4:00 a.m. and while they were

at this motel he died his hair from red to black and shaved his mustache off.

In substance, I believe that was the conversation we had with him at that time.

Q BY MR. WARNBERG: All right. That was enroute to the station?

A Yes, sir, that is correct.

Q All right.

Now, after that, while you were at the station, did you talk to the defendant Harrington again some time?

A Yes, sir, we did.

Q When was that?

A I believe that was approximately 11:15 p.m. in Room 115 at Firestone station.

Q All right, who was present at that time?

A Mr. Glen Harrington, Sergeant Gerald Rowley, Sergeant Harold White and myself.

Q All right. He spoke freely and voluntarily?

A Yes, sir, he did.

Q Now, at that time, now, as to Harrington, what was said at that time?

[fol. 589] THE COURT: Again, ladies and gentlemen, this will be received only as against the defendant Harrington and not as against any other defendant.

THE WITNESS: I believe again we advised him of his constitutional rights and at that time Mr. Harrington stated he preferred not to converse with us regarding this case.

We informed Mr. Harrington that we had Gilbert Cooper, Jesse Bosby and George Rhone in custody on the same charge and that these three persons, Mr. Cooper, Rhone and Bosby, had implicated him in—I believe we used the word "abortive robbery," and that it was our opinion that Jesse Bosby was actually the trigger man. Mr. Harrington at that time stated, "That, I will go for."

In substance, that was the conversation.

We returned to the Detective Bureau portion of Firestone station and Mr. Harrington at that time told us about a month previous to the time he was arrested he dyed his hair from brown to red and then again on the Friday night or early Saturday morning—

MR. WALTON: Excuse me, your Honor; I move that be stricken as being irrelevant.

THE COURT: Overruled.

MR. WALTON: And prejudicial.

THE COURT: Same ruling.

THE WITNESS: Either on a Friday night or early on a Saturday morning over in the motal in Pasadena he [fol. 590] dyed his hair from a red to a black.

In substance, I believe that was the conversation we had with Mr. Harrington.

[fol. 591] Q All right. And that, then, Officer, is the substance of all your conversations with each defendant?

A In substance, the best I can remember at this time, yes, it is.

MR. WARNBERG: Cross examine.

THE COURT: Mr. Rosen.

CROSS EXAMINATION

BY MR. ROSEN:

Q Mr. Vaughn, the first person of these four defendants that you talked to, took a statement from, was Gilbert Cooper, is that right?

A Yes, sir.

Q And that was on Saturday, December the 12th, at 12:30 a.m.?

A Yes, sir.

Q And in substance, in that statement, Cooper told you that he didn't know any of the other three fellows, is that right?

A I believe, yes, sir, that is correct.

Q And that he was just going into this market to cash a check and whatever happened he had no part of?

A Yes, sir.

Q And you talked to Cooper about what, an hour at that time?

A I believe it was approximately 45 minutes to an [fol. 592] hour, yes, sir. The statement will depict the exact times.

Q Well, it started at 12:30 and ended at 1:45 a.m., that would be an hour and 15 minutes; is that about right?

A Yes, sir.

Q Then you talked to Cooper again on the same day, December the 12th, about 12 hours later at noon, is that right?

A Yes, sir.

Q This second conversation with Cooper was not a conversation that was taken down by a shorthand reporter?

A No, sir, it was not.

Q Did Cooper volunteer to make this second statement or did you bring him in to an interrogation room to question him further?

A I believe we brought him in to the interview room for the purpose of obtaining information from him.

Q You didn't make him any promises or anything of that nature at that time, his second conversation?

A No, sir, at no time.

Q And he just completely changed his position and admitted his complicity in this Holmes Street market incident, is that right?

A He gave us the information that I previously testified to, yes, sir.

Q Well, this was entirely different from what he had [fol. 593] previously told you, as far as his participation is concerned, isn't that right?

A In substance, yes, sir.

Q Well, what did you tell him before that that may have induced him to change his position?

A Well, I thought he was lying and I didn't think any jury in the world would believe the story that he was kidnapped.

Q How long did you talk to him the second time?

A It would be approximately half hour, forty-five minutes.

Q And during the course of that half hour or forty-five minutes, how long was it from the time you first started talking to him, this second conversation, before it was that he told you that he went into the market to rob it?

A The first portion of the interview.

Q And it was just after you got through telling him that he was lying on his previous statement that he made

the statement changing his position that you have told us about?

A No, sir. At approximately 12:00 midnight or 12:30 a.m., after he was arrested, after the concluding of the conversation we had with him, just prior to returning Mr. Cooper to his cell, I told Mr. Cooper in my opinion that he was lying to us. And at the beginning of the conversa-
[fol. 594] tion the following day nothing was mentioned pertaining to that, that I recall.

Q Nothing was mentioned pertaining to what?

A The fact that I believed he was lying.

Q You mean when you had the second conversation with him at noon of December the 12th, at that time you didn't tell him that you thought he was lying before?

A I don't believe so, no, sir.

Q It was just you told him that he was lying when you got through interrogating him the first time?

A I told him in my opinion I thought he was lying to us.

Q You didn't before the second conversation talk about giving him a break if he came clean, or anything like that?

A No, sir, definitely not.

Q Well, all right. Then after you took this second—Incidentally, why didn't you bring in a shorthand reporter when you took his second statement, Cooper's?

A That, sir, was an oversight on our part. We just plain forgot about it.

Q You also have recording equipment at Firestone Station, don't you?

A Yes, sir.

Q Did you record any of the conversations that you had with any of the defendants in this case?

[fol. 595] A I don't believe we did, no, sir.

Q Then after talking to Cooper the second time at 12:00 o'clock noon on December the 12th, the next person that you talked to was Bosby, is that right?

A Of the defendants, yes, sir.

Q Of the defendants. And you talked to him at 6:00 o'clock on December the 12th of 1964, 6:00 p.m., is that about right?

A No, sir.

Q Well, when did you take the statement that you read here from Bosby?

A I believe, Counsel, your question was when was it —what time was it, or when was the next person we conversed with of the defendants. And the next one, Mr. Bosby, at the time he was arrested.

Q You mean at the place of arrest?

A Place and time, yes, sir, in reference to your original question.

Q All right. Now, then, after you placed him under arrest, about what time was it that you placed him under arrest?

A Detective Anderson and Bennett placed him under arrest at approximately 1:30 p.m. on December the 12th, 1964. We arrived within five minutes of that time after the officer had Mr. Bosby under arrest.

[fol. 596] Q At what time, sir?

A I think it was approximately 1:30 p.m.

Q And you will say you arrived—you mean at the scene where Bosby was arrested?

A Yes, sir, within approximately five minutes.

Q And you transferred him or transported him down to the Firestone station?

A Eventually we did, yes, sir.

Q About what time did you reach the Firestone station?

A Approximately 2:30, 3:00 o'clock.

Q Did you start questioning him then at that time?

A We had a conversation with him at that time, yes, sir.

Q Was that recorded in any way?

A Only in our notebooks and, also, a supplemental report that we dictated several days later.

Q Well, to begin with did Bosby deny any knowledge or participation in this robbery of this Holmes Street market incident?

A Yes, sir.

Q When you first started questioning him at 2:00 or 3:00 o'clock in the afternoon of the 12th of December, I take it he denied his participation?

A No, sir; I believe he—the only thing he denied regarding this was the fact he did not shoot the old man.

[fol. 597] Q But he has always denied that, hasn't he?

A Yes, sir, that is correct.

Q Aside from that, his knowledge and participation in an attempted robbery, didn't he deny that—that is, knowledge and participation—before the evening of December 12th when you talked to him?

A He could have, counsel, I do not recall.

Q Well, did you make any notes of any denials?

A I would have to refer back to my original notebooks, which I have in our evidence locker here in the Hall of Justice.

Q Well, when you talked to him between 2:00 and 3:00 o'clock, is that when you talked to him first at the station?

A At the station?

Q Yes.

A That would be the approximate time. I can give you the exact hour if you would like that.

Q That is close enough.

How long did you talk to him?

A I would say less than a half hour.

Q Who was present at that conversation?

A Mr. Bosby, Sergeant Harold White, myself; I believe Sergeant Gerald Rowley was present, also.

Q Did you call in a shorthand reporter at that time?

[fol. 598] A Not at that time; we did later in the afternoon.

Q You mean when you took the statement that you read here?

A Yes, sir, that is correct.

Q That was taken at about 6:00 o'clock, at least that is what it says on the statement.

The first time you talked with him for a half an hour or so there was no shorthand reporter there?

A That would have been the second conversation we had with him, and there was no shorthand reporter at that time.

Q At that time, in that half hour interrogation, didn't Bosby deny participation?

A He could have, counsel, I do not recall; but later in the conversation or during the conversation he did admit his participation in the robbery, in the planning of the robbery, but he denied actually shooting Mr. Serna, the victim in this case.

Q Why didn't you call in a shorthand reporter at that time, at 2:00 or 3:00 o'clock in the afternoon, when you had this conversation?

A Because normally it is our procedure to have or hold a conversation with a person first and then take a formal statement from him subsequent to that conversation.

Q You mean you are not afraid that if you let a fellow lay in the cell there for three or four hours that he [fol. 599] will change his mind?

A Beg your pardon?

Q You say your normal procedure is to, after a fellow tells you his participation, that some time later you will call in a shorthand reporter and take a statement; that is your normal procedure?

A We usually do it right away, immediately.

Q I would think so, before he changes his mind; isn't that right?

MR. WARNBERG: Objected to as argumentative.

MR. ROSEN: I will withdraw it.

Q But, at any rate, you didn't do it at 2:00 or 3:00 o'clock that afternoon; you didn't bring in a shorthand reporter?

A No, sir, we requested one later, at the termination of the conversation we requested a statement reporter.

Q And you took a statement from him at 6:00 o'clock that evening?

A I believe that is the hour, yes, sir.

Q Then the next thing you did with regard to these four defendants was bring Cooper and Bosby together; is that right?

A Yes, sir, that is correct.

Q And that was at about—

A Excuse me; no, sir, that is not correct.

[fol. 600] Q What did you do?

A I believe it was Sergeant Harris and Chance took one of the defendants, I believe it was Mr. Bosby, in the

Compton area so that Mr. Bosby could point out the address or the apartment in Compton where the four persons, four defendants in this case, were together Friday.

Mr. Bosby was returned to Firestone station and then we put Mr. Bosby and Mr. Cooper together in the interview room No. 115 and that is where we held a joint conversation with Mr. Bosby and Mr. Cooper.

Q Why did you bring Cooper and Bosby together? This is about 8:42 p.m. of December the 12th. What was your purpose in that?

A In determining the exact address of the residence in Compton where this meeting was allegedly held and to extract any additional information we could from them, jointly.

Q From them jointly?

A Yes, sir.

Q I mean, you wanted to get at the truth of what happened out there at the market; right?

A That is correct.

Q So you thought you might confront the two of them and see what they had to say about it together?

A Yes, sir, that is correct.

Q Well, in this conversation when Bosby and Cooper [fol. 601] were together—you had already known what Cooper had previously told you in his first and second interviews; is that right?

A Yes, sir.

Q And you know what Bosby had previously told you in that statement that he gave you at about 6:00 o'clock?

A Yes, sir.

Q Well, did you tell Bosby at this joint interview that, "Cooper says you are the one who did the shooting"; did you say that?

A We could have. I do not independently recall if that was mentioned or not. The primary purpose of the conversation between the two of them was to find the address of this third person in Compton.

Q I understand what your primary purpose was, but you have already told us that one of the purposes that you brought them together was to try to ascertain what the true facts were; is that right?

A Yes, sir.

Q I mean, you wanted to be fair to these two fellows, didn't you?

A All four of them, yes, sir.

Q Sure, so did you tell, when Bosby and Cooper were sitting there, "Mr. Bosby, Cooper says that you are the one who shot the gun"; did you tell that to those two fellows?

[fol. 602] A We could have, I do not recall. I would have to refer to my notes on that.

Q Would you do that, please?

A At the recess I will, yes, sir.

Q You mean you have no independent recollection of this?

A Not at this time, no, sir.

Q Didn't you think that was pretty important?

A Yes, sir, I think anything that is said between the defendants and the investigator is important.

Q Did you tell Cooper at this joint meeting between Bosby and Cooper, "Mr. Cooper, Bosby says that you and he, alone, were the two fellows who planned to, originally planned to knock over this market. What have you got to say about that?" Did you say anything like that to Cooper?

A I don't recall, counsel, it was a brief conversation.

Q Well, you were aware, were you not, of the differences in what Cooper had told you and what Bosby had told you?

A Yes, sir.

Q Did you make any effort at this joint conversation between these two fellows to reconcile those differences, to find out what the truth was between those two differences?

[fol. 603] A I don't recall, counsel. The primary purpose was just to obtain the location of the apartment in Compton, and I do not recall any lengthy questions regarding the actions at the market, itself. The primary purpose was to get the address.

[fol. 604] Q When you talked to these two fellows together, did you tell Cooper that Bosby said that Cooper had a gun?

A I do not recall, Counsel.

MR. ROSEN: All right, Sergeant, thanks. That's all that I have.

CROSS EXAMINATION

BY MR. MOORE:

Q Sergeant, when you talked to Cooper at 12:30 a.m. on Saturday, you say there was some conversation had that is not in your statement?

A No, I didn't say that.

Q I thought you stated that you told him it was a lie, no jury would believe it, or words to that effect?

A Oh, excuse me. Were you referring to 12:30 a.m.?

Q Yes, I'm sorry.

A After he was arrested?

Q 12:30 a.m. on Saturday, December 12th.

A Yes, sir, that is correct.

Q There was additional conversation that was not taken down by the stenographer, is that right?

A Yes, sir, that is correct.

Q And did you hold a conversation with Cooper before you called the stenographer in?

A I believe we did, just a brief conversation.

[fol. 605] Q And then at 12:00 noon you had another conversation with Cooper, is that correct, also on that date?

A Yes, sir, the 12th of December.

Q And the purpose at that time was to interrogate Cooper because you thought his other statement was a false one, is that right?

A That's correct.

Q And your statement is it was an oversight you did not have a stenographer present or a shorthand reporter?

A That is correct.

Q How did that conversation start off at 12:00 noon?

A Probably, in substance, asking Mr. Cooper if he would care to converse with us regarding this, we would like to obtain some additional information about it. I don't recall the verbatim words on that, Mr. Moore.

Q Well, had you made an effort to talk to him in between 12:30 a.m. and 12:00 noon?

A Did we make an effort to?
Q Yes.
A Sorry, I didn't understand your question.
Q Well, you say that at 12:00 noon you asked him was he willing to talk to you, is that right?
A In substance, yes, sir.
Q He never had expressed a desire not to talk to you, [fol. 606] had he?
A No, sir.
Q And you had a stenographer present when you interviewed Mr. Rhone, is that right?
A Yes, sir.
MR. MOORE: That's all, thank you.
THE COURT: Mr. Walton.

CROSS EXAMINATION

BY MR. WALTON:

Q Sergeant Vaughn, do you work out of Firestone Substation?
A No, sir, I work out of Headquarters here in Los Angeles.
Q Do you know where Watts is?
A Yes, sir. I worked there for six years.
Q Is this market at 61st and Holmes or 62nd and Holmes located in Watts?
A No, sir.
Q Watts is some miles south of the market, is it not?
A Yes, sir, it is; approximately three miles.
Q Do you recall approximately when it was that you first became concerned with this particular case?
A Yes, sir. It would have been approximately 2:35 p.m. on December the 11th, 1964, which would have been [fol. 607] a Friday afternoon.
Q And at some time in the middle part of that afternoon did you go to that market?
A Yes, sir, I did.
Q And were you more or less in charge of the investigation, or perhaps you and Sergeant White jointly?
A The case was assigned to Sergeant White and myself. Captain Phil Fallis of the Sheriff's Headquarters

Detective Bureau was there actually in command of the investigation at that time.

Q He was there at the market at that time?

A When I arrived, yes, sir.

Q And you interviewed various witnesses, is that correct?

A Yes, sir.

Q Did you later issue an all points bulletin or was one issued pursuant to your directions?

A I believe Sergeant White and I prepared it ourselves, and it was transmitted from the Firestone Station.

Q That went out some time that evening, did it not?

A I believe it did, yes, sir.

Q And that bulletin listed the suspects as four male Negroes, didn't it?

A I believe three of them were specifically named as [fol. 608] Negroes. The fourth one—may I read it verbatim from the teletype? Would that clarify—

Q What would "four M.N." mean?

A Male Negro, four male Negroes.

Q Do you recall whether that was in the bulletin?

A Yes, sir. With the additional description in the bulletin that the fourth person was light complected, I believe, red hair and red moustache, light complexion. I don't believe it stated possible male Negro. I believe it stated just male Negro, light complexion, red hair and a red moustache, giving his height and weight, also, I believe.

Q And do you recall from whom you had received that information?

A Yes, sir.

Q Who?

A From Mrs.—well, a portion of it, yes, sir, from Mrs. Robbins, Mr. Ashcraft, and I believe Deputies Bennett and Anderson gave me a partial description also.

I believe Mrs. Robbins stated in her opinion she wasn't 100 per cent sure if it was a pure Negro or a mixed blood individual involved, and—

Q Do you recall—I'm sorry, go ahead.

A And Mr. Ashcraft, I believe, stated that he wasn't

certain, either, if the person was a 100 per cent Negro or mixed blood.

[fol. 609] Q Do you recall whether you spoke to Lottie Mae Williams that afternoon?

A Either it was that afternoon or that evening we conversed with her.

Q Do you recall whether it was before or after the all-points bulletin was issued, or the bulletin?

A I believe it was prior to—I'll have to refer back to the reports on that, counsel.

Q Well, your best memory is that it was before that, is that correct?

A No, I wouldn't care to venture a true and accurate statement on that.

Q Incidentally, how many bullets did you say you removed from People's 7?

A Bullets?

Q Yes.

A I believe it was either eight or nine live rounds of .22 caliber ammunition.

Q Well, how many did you count up there on the stand today?

A Nine.

Q And all of those were bullets which you or someone in your presence removed from that gun, isn't that correct?

A I cannot say that they are one hundred per cent the bullets. I didn't mark them. But, however, they are the [fol. 610] general type and appearance of those that were removed.

Q Well, to your knowledge, have these bullets been outside the custody of the Sheriff since the time that gun was recovered?

A No, sir.

Q It has been within the custody of the Sheriff, has it not, that package of bullets?

A Except the time it was in custody of the Municipal and Superior Court clerks.

Q And that is a 9-shot revolver, is it not?

A Yes, sir.

MR. WALTON: I have nothing further.
THE COURT: Mr. Gordon.

CROSS EXAMINATION

BY MR. GORDON:

Q Sergeant Vaughn, in some of your questioning I believe you asked Harrington—you used the word, I believe, "abortive robbery." Do you remember using that word?

A Yes, sir.

Q Now, you have investigated many a robbery case, have you not?

A Yes, sir.

Q About how many, would you say?

A I would say less than a hundred.

[fol. 611] Q Less than a hundred?

A Between fifty and a hundred.

Q All right. Now, when you questioned Rhone, did you ask Rhone if the fight that allegedly was had by Bosby with the deceased was planned?

A No, sir.

Q Did you ask Rhone whether or not the collision that one of the men allegedly had with the deceased was planned?

A The collision?

Q Yes, the collision as related by Mrs. Robbins, the collision in the middle of the store between one of the men and the deceased.

A I do not believe the word "collision" was used at any time during any of the interviews by either any of the officers or any of the defendants.

Q You didn't ask, then, any questions about an alleged bumping of one person into the other in the store?

A No, sir, I do not believe we did.

Q Well, now, did you remember to ask anything about the knocking over of a couple of stands there in the store by two people or by one person during the course of this event?

A Yes, sir.

Q Whom did you ask about it?

A I believe that was Mr. Rhone. It should be in the [fol. 612] statement I previously read.

Q Well, did you ask him whether or not any of this activity was planned, that is, the alleged bumping into by one person into the other, or the knocking over of any of those boxes?

A I do not believe that was specifically asked of Mr. Rhone, no.

Q Did you ask whether or not any activity was planned to occur in the rear of the store as part of the robbery?

A No, sir, I don't believe we did.

Q All right. Now, did you ask any of them if this was unexpected—ask any of the men who are accused if this was unexpected happenings in the events there?

A I believe, in substance, that was brought out that it was not a planned event, but it just happened during this event.

[fol. 613] Q All right.

Now, did you ask Rhone whether or not this was a personal feud which arose before the robbery between the deceased and Mr. Bosby?

A A personal feud? No, sir, we did not ask that question.

Q You didn't ask that question?

A Not that I recall, Counsel, no, sir.

Q Well, now, did you ask Mr. Rhone or say to Mr. Rhone, "Why is it that no one said there was a holdup," or "Announced that there was a holdup?" Did you ask him that?

A I believe—I can't say, Counsel, for sure of that. I believe it was about in one of the conversations that was not taken down by a stenographic reporter, but I cannot give an honest answer on that, I'm sorry.

Q Well, now, did you ask any of the men whether or not anyone of them was to announce that there was a holdup?

A I do not recall, Counsel.

Q Is this the reason why you said "abortive holdup," or "abortive robbery," or used those words?

A I am sorry, I don't understand your question.

Q Well, when you said you talked to, questioned one of the men—I believe you told him that there had been an abortive robbery?

[fol. 614] A Yes, sir, that would have been the conversation I had with Mr. Harrington en route to Firestone Station.

Q What do you mean by the word "abortive"?

A Uncompleted robbery.

Q Uncompleted.

Now, did Rhone tell you that the first thing that was supposed to happen was that Cooper was to cash a check?

A The first thing that Mr. Rhone said or the first thing that was to happen?

Q Yes.

A I would have to refer back to the statement on that, Counsel, I don't recall.

Q Well, you do remember asking him how this matter was planned, didn't you?

A Yes, sir.

Q Didn't he tell you, or do you remember now that he said Cooper was to cash a check?

A I believe it was mentioned that someone was to cash a check. I would have to refer back to my report and statement.

Q Did any of the men tell you that Bosby was to go and engage in any type of activity in the back of the store?

A Not that I recall, no, sir.

Q Now, did you ask Mr. Rhone whether or not at any [fol. 615] time that these men said to the people in the store, "All of you back here"?

Do you remember asking him at any time whether such a statement was made?

A I believe that was brought out in the conversation with Mr. Rhone, something about that, yes, sir.

Q Do you believe it or you are not sure?

A I am not sure. I think it is in the statement that I read this morning.

Q You are not sure?

A No.

Q Would you like to refresh your memory?

A Yes, sir.

THE COURT: I can help, it is a lot easier.

THE WITNESS: Thank you.

I can't find it, sir, in the statement.

Q BY MR. GORDON: Then your memory is refreshed now that you made—that you asked Rhone any such question?

A I could not recall if I did, no, sir.

Q Didn't Rhone tell you that although he had planned a robbery that one did not have a chance to take place because of what happened in the back of the store?

A Will you repeat that, Counsel?

MR. GORDON: May it be read?

THE COURT: Yes, Mr. Reporter.

(Record read by the reporter.)

[fol. 616] THE WITNESS: I believe he stated in regards to that that they did not acquire any money from the store.

Q BY MR. GORDON: Well, he also told you that he hadn't even had a chance to commence a robbery; didn't he tell you that?

A Not in those words, no, sir.

Q But in other words, substantially that?

A I don't recall, Counsel. I believe the only thing he said, that they were unable to get any money or they did not acquire any money.

Q Now, did you ask Rhone if anyone of the men wasn't a hop-head?

A Yes, sir, we did.

Q And didn't you tell Rhone and get an answer from him, words to this effect: "Well, you boys didn't even get a chance to get going on your plans because this guy fouled everything"; didn't you say that to him?

A No, sir, I don't believe we did.

Q Did you say something like that?

A It was in substance that everything was goofed up on the robbery; instead of being a stickup it was a goofup.

Q Right, and by that it was a personal feud between Bosby and some person that wasn't even contemplated; isn't that right?

A I would have no knowledge of any personal feud [fol. 617] between Mr. Bosby and any person in there, Counsel.

Q Well, when you say you have no knowledge, you knew that there was a collision between the two of them and some words between them, didn't you?

A I knew of an altercation or a shoving and possibly some words and possibly some cans or bottles was thrown back and forth between Mr. Serna and Mr. Bosby.

Q Didn't two men fall on the floor there?

A I believe just one, and that would have been Mr. Serna after he had been shot.

[fol. 618] Q Didn't you learn during the course of your investigation that there were two persons on the floor and that Bosby was the last one getting up?

A No, sir; that was never brought out, to my knowledge.

Q Never heard of that?

A No, sir, I sure didn't. The question was brought up, if Mr. Bosby had sustained any injuries during this event, and it was determined that he did not obtain any injuries on it.

Q Didn't you hear during the course of your investigation that a bottle might have been thrown by someone?

A Yes, sir.

Q And didn't you find a broken bottle on the floor with some blots of blood around the bottle?

A What appeared to be blood, yes, sir, and a broken bottle with what appeared to be wine, red wine, on the floor in front of the delicatessen, where it is marked as "Refrigerator" on the chart.

Q There was some red wine some place and there were some blood, three spots of blood by the bottle, also; is that right?

A In the vicinity of the bottle, yes, sir.

Q Did you ever ask these men whether or not Bosby was injured when a bottle was thrown?

A I believe it was asked of all of them, primarily if [fol. 619] Bosby had been injured or possibly if anybody had been injured as results of this event, other than, of

course, Mr. Serna, the victim; and the answer was in the negative, that no one had been injured.

MR. GORDON: Thank you for your indulgence, your Honor.

No further questions.

THE COURT: You may step down—

MR. ROSEN: Your Honor, may I ask one more question, please.

THE COURT: Go ahead.

FURTHER CROSS EXAMINATION

BY MR. ROSEN:

Q Where was the broken bottle of wine found, Mr. Vaughn?

A It was approximately midway between the area that is now marked "Refrigerator" and the area marked "Freezer and cooler," with a little—I would say a little closer to the northeast corner of the freezer stand where there is—which should be a circle marked—in that immediate vicinity, on the floor.

Q You mean somewhere in the center portion of the premises?

THE COURT: Will you take that orange crayon, sir, and mark approximately the area, please?

THE WITNESS: In my opinion, that would be the [fol. 620] approximate position the broken wine bottle was found by me at the time I arrived at the scene.

MR. ROSEN: That is all I wanted to ask him, your Honor.

THE COURT: Thank you, sir, you may step down.

MR. WARNBERG: May the officer be excused?

THE COURT: Any objection to the officer being excused?

MR. GORDON: No, your Honor.

MR. WALTON: No, your Honor.

MR. MOORE: No, your Honor.

MR. ROSEN: No, your Honor.

THE COURT: You may be excused, thank you.

MR. WARNBERG: We offer now, your Honor, into

evidence our exhibits, People's 1 through 14, I believe, that have heretofore been marked for identification.

THE COURT: They will be received.

MR. WARNBERG: People rest, your Honor.

THE COURT: We will take a short recess, ladies and gentlemen, then we will go into the defense.

I admonish you at this time, again, remember that you are not to discuss this case amongst yourselves or with anyone else, not to form or express an opinion with respect to the case until it has been submitted to you for your decision.

MR. WALTON: Your Honor, I have a motion to make either before or after the recess.

[fol. 621] THE COURT: I will take it before.

Go ahead, ladies and gentlemen.

(Jury leaves the courtroom.)

THE COURT: The record may indicate the jury has left the courtroom, the defendants are still present with counsel.

Yes, Mr. Walton.

MR. WALTON: Your Honor, this is a motion on behalf of the defendant Harrington for a mistrial predicated upon these grounds:

This morning there was testimony by Officer Loniero that the defendant Harrington had told him that he had used a different name within the last three months. I made a motion at that time, which was denied.

Later there was testimony by the investigating officer, Sergeant Vaughn, to the effect that Rhone had told him at the time of Rhone's arrest that the car across the street belonged to Glen, that it was registered to a James Larson, and that name was a phony name. I made a motion at that time, which was denied.

Now, the officer has further testified that at the time that he had a conversation with the defendant Harrington in the back seat of the police car, in which the defendant was being transported to some police facility, that defendant Harrington told him that he had dyed his hair red about a month prior to the time of that arrest.

Now, I feel that the cumulative impact of all of this [fol. 622] testimony is necessarily prejudicial to the defendant Harrington. It shows that at some time long prior to the robbery he was using a name other than his true name, that he had dyed his hair at that point, and it would indicate, I feel, very clearly that he was perhaps engaged in some kind of improper or unlawful activity.

And I don't feel that this set of circumstances can escape the jury as portraying the defendant Harrington as some kind of evil character, and thus depriving him of an opportunity to have a fair trial.

THE COURT: The motion is denied.

All right, gentlemen, let me just inform you—I know there has been discussion previously, mostly off the record, as to whether there will be a defense or not a defense with respect to one defendant or all of the defendants.

I just want to advise you now that we're going to take the recess, and you attorneys discuss with your clients whether or not there is to be a defense.

I would like to know that so that we know how to proceed.

MR. ROSEN: I would like to tell your Honor right now, I have discussed with Mr. Bosby whether or not he is going to take the stand in his own behalf. He knows that he has a constitutional right to do so.

He has informed me that it is his desire not to take [fol. 623] the stand.

THE COURT: Well, I take it, then, that—

MR. ROSEN: This is his position now.

THE COURT: —you are going along with his position and he will not take the stand?

MR. ROSEN: That's right.

THE COURT: Will there be any other defense on behalf of the defendant Bosby?

MR. ROSEN: Certainly not at this stage.

THE COURT: You are not going to call anyone?

MR. ROSEN: I am not.

MR. MOORE: There will be none.

MR. WALTON: None.

THE COURT: Mr. Gordon?

MR. GORDON: I will let you know when you come back, your Honor. I want to talk to my defendant once more. I want you to know he has indicated probably not.

THE COURT: That is perfectly all right. It is their right to either testify or not testify. That is their constitutional right. I just want to know how I'm going to conduct the rest of the trial.

MR. GORDON: Yes, your Honor.

THE COURT: If none of them testify, that is the end of the case, that is it, and it is a question about argument.

If none of the defendants testify, I would expect to go [fol. 624] into argument this afternoon, starting argument by the prosecution, have the prosecution make the opening argument this afternoon.

But I don't know how long it will be, Mr. Warnberg, but you think about it.

If it takes an hour, that will be all we will do this afternoon. If he takes less than that, we may go into starting argument of one of the defendants.

And I expect then, gentlemen, also, if there is no defense today on behalf of anyone, I want your instructions no later than tomorrow morning at 9:00 o'clock. I'd prefer to have them before 9:00 o'clock, but I suppose it is too much to expect of you to get them here at 8:30. But by 9:00 or before tomorrow morning I would like to have the instructions.

MR. WARNBERG: I have submitted some already, your Honor. I think counsel have seen them.

I have merely this to state; that there are a series in that group, however, that have been re-revised that pertain to the series on statements of defendants since the Dorado decision, and I'm still trying to find the re-revised Cal. Jic. instructions.

THE COURT: I may be able to help you. I have a series of revised instructions, if you want them. I received them from the District Attorney's office in many cases up to now, so they should be downstairs.

[fol. 625] MR. WARNBERG: I had them once before and for some reason—but I'm still going to look.

THE COURT: As long as I have them by tomorrow morning.

MR. WARNBERG: Yes. I think I can find some.
THE COURT: All right.

(Recess.)

[fol. 626] THE COURT: Mr. Rosen, will there be any defense on behalf of Defendant Bosby?
MR. ROSEN: Defendant Bosby will rest, your Honor.
THE COURT: Mr. Moore?
MR. MOORE: We rest.
MR. WALTON: Harrington rests.
THE COURT: Mr. Gordon?
MR. GORDON: Mr. Rhone will take the stand.
THE COURT: Mr. Clerk, swear the witness, please.
THE CLERK: You do solemnly swear that the testimony you may give in the case now pending before this Court shall be the truth, the whole truth and nothing but the truth, so help you God?
THE WITNESS: Yes, sir.

GEORGE RHONE, JR.,

a defendant herein, called as a witness in his own behalf, having been duly sworn, was examined and testified as follows:

THE CLERK: Will you be seated, please? Will you state your name, please.
THE WITNESS: George Rhone.

DIRECT EXAMINATION

BY MR. GORDON:

Q Mr. Rhone, you are one of the defendants in this [fol. 627] case?
A Yes, sir.
Q And you have already been advised that you did not have to take the stand?
A Yes, sir.
Q You wish to testify?
A Yes, sir.
Q Now, Mr. Rhone, how old are you?

A 27.
Q Keep your voice up?
A 27.
Q How tall are you, about?
A About six six.
Q Now, do you remember the incident that happened at 6126 South Holmes Avenue in Los Angeles?
A Yes, sir.
Q And that was in December?
A Yes, sir.
Q And was that December the 11th?
A Yes, sir.
Q 1964?
A Yes, sir.
Q Now, had you met beforehand with some other persons and planned to go to this place?
A Yes, sir.
Q Keep your voice up, please.
[fol. 628] A Yes, sir.
THE COURT: Put the microphone just below your chin, sir, just a little bit. That is fine. I think that will work better.
THE WITNESS: Yes, sir.
Q BY MR. GORDON: Now, Mr. Rhone, was it your intention when you went into this place on Holmes Avenue to commit a robbery?
A At that time?
Q When you went in the place, was it your intention?
A Well, no; it was the intention of the robbery, but it wasn't the intention to rob it at that time. It was to look it over.
Q Keep your voice up, now. Keep your voice up, please.
A It was to look it over.
Q All right. Now, did you have a gun—
A No, sir.
Q —when you went in the place?
A No, sir.
Q Now, who else went in with you?
A It was myself and Harrington.
Q Did anyone else go in with you?

A No, sir.

Q Did someone go in before you?

[fol. 629] A Yes, sir.

Q Who?

A Bosby and Cooper.

Q You knew all of these men?

A Yes, sir.

Q And had you talked over going in this store prior to this day, before this day?

A No, sir.

Q Had you talked over and discussed about you going into this store before December the 11th?

A No, sir.

Q Well, hadn't you met at some house?

A Yes, sir.

Q But that was before that day, wasn't it?

A No, sir, it wasn't.

Q Same day?

A Yes, sir.

Q That's the first time you discussed it?

A Yes, sir.

Q Had you ever been to this store before?

A No, sir.

Q Now, when you went into this place, you walked in with Harrington?

A Yes, sir.

Q Did any of you fellows say "Holdup"?

A No, sir.

[fol. 630] Q Was it planned or was it discussed by any of you men that Bosby was to get into a fight with the man in the rear of the store?

A No, sir.

Q Was this a surprise happening to you?

A Yes, sir.

Q Now, did you pull your gun or pull any gun or see anyone else pull any gun other than Bosby at that time?

A No, sir. I didn't see Bosby pull a gun, either.

Q All right. Now, what occurred in the back of the store, as far as what you saw?

A All I know, it was a scuffle.

Q Tell what you saw, please.
A Well, I didn't see it. It was just out of the corner of my eye, I just seen the scuffle, that's all.
Q What did you see out of the corner of your eye?
A Well, I saw the victim throwing cans and things at Bosby there.
Q Was Bosby hit with one of these cans?
A I don't know if he was or not.
Q Did you hear a bottle drop? Just answer yes or no.
A Well, at that time, not right at that time I didn't, no.
Q Did you hear anything break?
A I can't say if I heard anything break or not.
[fol. 331] Q Now, was this a surprise, unexpected thing to you?
A Yes, sir.
Q And when this thing happened in the back of the store did you do anything toward holding up that place?
A No, sir.
Q Now, you are admitting now, however, you discussed holding it up; is that right?
A Yes, sir.
Q Did you see anyone or hear anyone say to the people to get in the back?
A No, sir, I didn't.
Q Was it discussed by any of you that Bosby was to at any time get into a conversation with any man in the back of the store?
A No, sir.
Q Was Bosby to present a check, also?
A No, sir, I don't believe so.
Q Then, is it your statement that although you went in the store to pull a robbery, you didn't have one?
A Well, no, not exactly. We went into the store to look at it. You see, I hadn't even seen it yet.
Q I see. That is, you wanted to case the place?
A Right.
MR. GORDON: Your witness.

[fol. 632] CROSS EXAMINATION

BY MR. WARNBERG:

Q Who did you talk this over with?
A Bosby and Cooper and Harrington.
Q When did you talk that over with them?
A That was that day, earlier, about two or three hours earlier, I think.
Q I wish you would just talk a little louder. You say earlier that day?
A Yes, sir.
Q Are you talking about December the 11th, 1964?
A Yes, sir.
Q Had you known the other three men before that day?
A I had known two of them; I just met one that day. I had known two of the men earlier, but one of the men I didn't know.
THE COURT: Excuse me.
Mr. Bailiff, maybe you can adjust this mike over here better for him.
Thank you.
Q BY MR. WARNBERG: You say you knew two of them?
A Yes, sir.
Q Who were the two you knew?
A I knew Glen Harrington and Jesse Bosby.
Q When did you meet Cooper?
[fol. 633] A That day.
Q Where; where did you meet Cooper?
A Why, he came to my house with Bosby.
Q In other words, Bosby brought Cooper over to your house?
A Yes, sir.
Q And you were already at your house with Harrington?
A Yes, sir.
Q Had you had an arrangement for Bosby to come over to your house?
A No, sir.
Q Did it just happen or what?

A Well, he is a friend of mine. He comes over, sometimes I go over to his house.

Q All right.

So you and Harrington were at your house and about what time was it that Bosby and Cooper came over there?

A I don't know. It was in the morning hours, around 10:00 or 11:00, somewhere around there.

Q Did you talk about the market?

A Yes, sir.

Q What did you talk about?

A I don't know what you want me to say.

THE COURT: De doesn't want you to say anything, sir. He just wants you to repeat the conversation that was [fol. 634] had, sir, if you remember.

THE WITNESS: That was the discussion, about the market, yes, about holding it up.

Q BY MR. WARNBERG: There was you, Bosby, Cooper and Harrington?

A Yes, sir.

Q You talked about holding up the market?

A Yes, sir.

Q How were you supposed to do it; what was the conversation?

A Well, there wasn't an actual plan, because I hadn't seen it. I had to see it first.

Q What did you say; what are you talking about?

The four of you were there in the room; is that right?

A Right.

[fol. 635] Q What was said?

A Well, it was mentioned about how much money would be there and that it would have to take place on Friday. And that was about it.

Q In other words, the robbery was to take place on a Friday?

A Yes.

Q You were talking about how much money was there?

A Yes.

Q Talking about guns?

A Yes, I believe that was mentioned, too.

Q In other words, when you committed the robbery, it was supposed to be with guns?

A Yes, sir.

Q Was December the 11th on a Friday?

A Yes, sir.

Q All right. Anything else said at that time?

A No, I don't recall, except that I wanted to look the place over first.

Q That is what you said?

A Yes, sir.

Q What did they say?

A Well, we all agreed.

Q What did they say?

A They said, "Well, we'll go and look it over."

Q All right. Did you talk about how much money [fol. 636] you'd get?

A They wasn't sure how much money would be there.

Q What was said about it?

A Well, it was supposed to be known that they cashed checks on Friday and that a lot of people from different jobs would come and get their check cashed there.

Q So you knew there would be a lot of money there on Friday?

A Well, we knew that it would be more on Friday than it would at any other time.

Q All right. That was about 10:00 o'clock or something like that that you were in there talking about that?

A Yes, sir.

Q What is the next thing you did?

A Then we went to the market.

Q What time, about?

A I couldn't say what time it was.

Q Well, did you stay at your house all that time until the afternoon?

A Yes, sir.

Q Talking about the market?

A Well, not too particularly about the market; about anything.

Q Talking about your plans?

[fol. 637] A Yeah, we talked about that, yes.

Q Talking about the robbery?
A Yeah, we talked about the robbery.
Q All right. Where did you go then?
A Then we went to the market.
Q How did you get to the market?
A We drove there.
Q Who drove?
A Harrington drove his car and Gilbert drove his car.
Q Harrington drove his car?
A Yes.
Q What kind of a car did he have?
A He's got a Ford.
Q Did you go with Harrington?
A Yes.
Q And who drove the other car?
A Gilbert Cooper.
Q What kind of a car did he have?
A He had a Mercury.
Q Two-tone green?
A Yes.
Q Who went with Cooper?
A Bosby.
Q Did you folks meet some place about two blocks away from the market?
[fol. 638] A It was a little mixup at first, because we lost them on the way down. I didn't know exactly where the place was located.
Q Who did you lose?
A We lost Gilbert Cooper and Bosby.
Q Well, did you find them over there about two blocks away?
A No, we found them in a gas station.
Q What did you do at the gas station?
A Well, they were getting gas and were changing oil, or something there.
Q In other words, Cooper and Bosby gassed up, is that it?
A Either they were gassing up or changing oil or getting water, or something. I don't remember.
Q All right. Then when they left the gas station, did you follow them?

A Yes, sir.
Q Where did you go?
A Well, we drove past the market. They pointed it out to me. And then we drove—I don't know—maybe three or four blocks east of the place, and we all got into one car.
Q Whose car did you get into?
A Cooper's.
Q Was this where you switched the cars?
[fol. 639] A Yes, we all got into one car.
Q The Ford, in other words, was left at that location?
A Yes, sir.
Q Was the motor left running?
A No, sir.
Q What did you do with the Ford?
A We left it there.
Q Parked it?
A Yes, sir.
Q Then the four of you all got into Cooper's car?
A Yes, sir.
Q Did you have guns?
A No, sir, not all of us.
THE COURT: He said, "not all of us."
Q BY MR. WARNBERG: Who had the guns?
A There were only two guns. There was Bosby's and Harrington's.
Q Bosby had a gun and Harrington had a gun?
A Yes, sir.
Q Then you drove to the market?
A Yes, sir.
Q Did Cooper go in first?
A I don't know. I wasn't present at the market when they went in.
[fol. 640] Q Did Harrington have red hair that day?
A Yes, sir.
Q How about Cooper and Bosby, did they go in the market first?
A I don't know. I wasn't present when they went in the market.
[fol. 641] Q Did they leave you and Harrington in the car?

A No, they didn't.

Q In other words, your testimony, then, is you all went in together?

A No, it isn't. I wasn't present when the first man went in the store. I wasn't in the vicinity then. I was about a block away, maybe, maybe two blocks, a block and a half.

MR. GORDON: May the answer be read?

THE COURT: Yes, Mr. Reporter, read the answer.

(Record read.)

Q BY MR. WARNBERG: Did somebody go in the store first?

A Yes, sir, I believe so.

Q Who went in first?

A I can't say who went in first.

Q Did he then come out?

A Yes, I believe he did.

Q Did he talk to you?

A No, he didn't.

Q Well, after that did all of you then go in the store?

A Well, like I say, it was a little mix-up, it wasn't—

MR. GORDON: Can you speak up louder, please?

THE WITNESS: It was a mix-up then.

[fol. 642] Q BY MR. WARNBERG: Can you just answer the question, so—

A Okay.

Q Did you all go in the store?

A Yes, eventually, yes.

Q Are you acquainted with the diagram, People's Exhibit No. 4?

A Yes, sir.

Q Where did you go?

A When I came in I stood right in front of the shelves in the front there.

Q Which shelves are you referring to?

A The ones right here in the front, in front of the freezer.

Q Are you talking about the book rack shelves?

A No, sir.

Q The card rack?
A No.
Q Oh, here?
A Yes, I was there.
Q You stayed there?
A Yes, sir.
Q Where did the other three men go?
A I say, Harrington was maybe by the card rack and Cooper was—
MR. GORDON: I can't hear you.
[fol. 643] THE WITNESS: Cooper was at the cash register.
Q BY MR. WARNBERG: Harrington at the card rack; Cooper at the cash register?
A Yes, sir.
Q And you by the shelves?
A Yes, sir.
Q Where was Bosby?
A I couldn't see Bosby at that time; I couldn't see him.
Q How many men had guns?
A Two.
Q Did you hear a shot?
A Yes, sir.
Q Where did you hear the shot?
THE COURT: You mean where did he hear it come from or where was he standing?
Q BY MR. WARNBERG: Yes, where did you hear it come from?
A It sound like it was in the store some place, maybe the center or I don't know exactly where.
MR. GORDON: I didn't hear.
THE COURT: Mr. Reporter, read it back.

(Record read.)

THE COURT: Please try to talk louder, sir.
Q BY MR. WARNBERG: What happened then?
A After the shot?
[fol. 644] Q Yes.
A Well, after the shot everybody ran, everybody ran out of the store.

Q Did you?
A Yes, sir.
Q Where did you run to?
A We run to a Mercury that was parked outside.
Q Back to the same car?
A Yes, sir.
Q Did all four of you get back in the car?
A Yes, sir.
Q Where did you go?
A Went back into the vicinity of where we left the other car.
Q In other words, you got back to the other Ford car, then?
A Yes, sir.
Q What did you do?
A I got out of the Mercury and got into the Ford.
Q With whom?
A Harrington and Bosby.
Q Harrington and Bosby got back into the Ford with you?
A Right.
Q And Cooper stayed in the Mercury?
A Yes, sir.
[fol. 645] Q Where did you go?
A I went back home then.
Q Did you later see those same people?
A We all went home to my house.
MR. GORDON: Now, this is outside the scope of direct, your Honor.
THE COURT: The objection is overruled, sir.
MR. GORDON: Thank you, sir.
Q BY MR. WARNBERG: You all three of you went to your house?
A Yes, sir.
Q How long did you stay there?
A I don't know. I have no idea.
Q All night, or what did you do?
A No, it wasn't all night; till that evening some time.
Q Did you see the guns again?
A No, sir.

Q What did you eventually do; did you stay there or what did you do?

A Well, eventually I went to Pasadena.

Q Who with?

A Bosby, Harrington.

Q Is that when you went to that motel?

A Yes, sir.

Q In the meantime did you throw a weapon any place?

[fol. 646] A No, sir.

Q Did you store any weapons?

A No, sir.

Q How long did you stay in Pasadena?

A Till the next morning.

Q Did Harrington dye his hair in Pasadena?

MR. WALTON: Object to that, your Honor, it is beyond the scope.

THE COURT: Overruled.

You may answer it, sir.

THE WITNESS: Yes, sir.

Q BY MR. WARNBERG: What color did he dye it to?

A Black.

Q Now, you talked to Officer Vaughn, did you not?

A Yes, sir, I did.

Q Do you recall telling him that you went in there to rob the market?

A I don't know if I told him I went in to rob it or I went in to case it.

[fol. 647] Q Now, let me ask you one of the first questions he asked you.

> "Now, this interview today pertains to the robbery and shooting at Robbins' Market . . ."

And before that he had asked you to state who the other people you were with and you said that it was Harrington, Cooper—

MR. GORDON: To this I object upon the grounds it is an improper method of impeachment, your Honor.

THE COURT: I think it is preliminary. The objection is overruled.

MR. GORDON: Yes, your Honor.

Q BY MR. WARNBERG: And the other defendant. He showed you some pictures, didn't he?

A Yes, sir.

Q And you said who they were. Then Officer Vaughn asked you, "Did you and the previous persons I have just mentioned get together some place Friday and discuss or have a conversation pertaining to possibly robbing this market?" And you said, "Yes, sir."

A Yes, sir.

Q And he asked you; "Approximately what time was that?"

And you said, "About noon"?

A Yes, sir.

Q He asked you, "Where was that?" And you said, [fol. 648] "In Compton"?

A Right.

Q He asked you, "At your sister's house?" And you said, "Yes"?

MR. GORDON: Now, your Honor, I submit that up to now these matters have been questioned and he has answered affirmatively the questions that counsel is asking him, unless these are just preliminary questions. I object to the form of impeachment at this time.

THE COURT: The objection is overruled. I don't think the questions are being asked in order to impeach the witness?

MR. GORDON: Oh, I see.

Q BY MR. WARNBERG: Is that right?

A Yes, sir.

Q And then the officer asked you, "Whose idea was this to rob the market?" And you said, "It was Jesse's"?

A Yes, sir.

Q He asked you, "Did Jesse lay out the plans?" You said, "Yeah."

"To knock over the market?" And you said, "Yeah"?

A Yes.

Q Then he asked you, "Was Jesse Bosby or Gilbert Cooper to go in the market first or this white fellow [fol. 649] known as Glen Harrington"?

A Yes, sir.

Q And you said, "To try and cash a check"?

A Yes, sir.
Q Is that right?
A Right.
Q Was that the agreement?
A That's the way it was supposed to go, yes, sir.
Q What?
A Yes, sir.
Q Is that the way you were going to do it that day?
A It wasn't decided whether we'd do it that day or not.
Q Isn't that actually happened?
A I don't understand you.
Q Isn't that what happened that day?
A That's what happened, yes, sir.

MR. WARNBERG: Would your Honor bear with me for just one moment?

THE COURT: Go ahead.

Q BY MR. WARNBERG: Did you know any of the people in the market?
A No, sir.
Q Did the other defendants tell you they had been there before?
[fol. 650] A Yes, sir, they mentioned it.

MR. WALTON: Excuse me, your Honor. Might I have that question read?

THE COURT: Yes, sir. You may read the question and the answer, Mr. Reporter.

(Record read.)

THE WITNESS: That is, except Harrington; he had never been there.

Q BY MR. WARNBERG: Now, when you were in the market did Jesse have his gun out?
A No, I didn't see it out.
Q Isn't it true that Officer Vaughn asked you, "Did you see Jesse have his gun out at any time?" And you said, "Yes"?
A I don't know, I don't recall.
Q And isn't it true that Officer Vaughn said, "Well, when did you see Jesse have his gun out?" And you said, "When the scuffle first started"?

A I don't know. I don't recall if I said that or not.
Q Did you see Jesse hit the man?
A Yes, sir, and vice versa.
Q What did he hit him with?
MR. GORDON: May his last answer be read, your Honor? I did not hear it.
THE COURT: Yes, sir.

[fol. 651] (Record read.)

Q BY MR. WARNBERG: What did he hit the man with?
A I don't know if it was a can or a potato chip or what.
Q Isn't it true that Officer Vaughn asked you, "All right. What was Jesse doing with his gun?" And you answered, "I think he was hitting him with him"?
A I don't know. I may have said that, I don't know.
Q Isn't it also true that Officer Vaughn asked you, "On what part of the body was Jesse hitting the clerk?" And you said, "The upper part"?
A Yes, sir.
Q And he also asked you, "Towards the face and neck and shoulders?" And you said, "Yes"?
A Yes, sir.
Q And then Officer Vaughn asked you, "How many times did you see Jesse hit the old man?" And your said "Well, I couldn't just see. It was off-glance-like I see him hitting him. I don't know how many times or what"?
A Yes, sir.
Q Then Officer Vaughn asked you, "How long a gun was this that Jesse had?" And you said, "Oh, maybe this long," and you showed him?
A Yes, sir.
Q You told Officer Vaughn that?
[fol. 652] A I don't recall. Maybe I did, but I don't know if I did or not.
Q And then Officer Vaughn asked you, "Did you see the old man fall to the floor of the market after the shooting?" And you said, "I saw him stumble and fall"?
A Yes, sir.

Q Now, did Officer Vaughn ask you these questions and you gave these answers:

"Q Who went over and tried to get into the cash register?"

And you said, "Jesse and the other guy."

"Q And Glen?"

And you said, "No."

"Q Gilbert Cooper?"

And you said, "Yeah."

And then Officer Vaughn asked you, "What did they do when they got over to the cash register?"

And you answered, "Well, there was such a panic at that time and they just kidded, were going to try to open it and pull the drawer open, but it wouldn't come open."

Do you remember telling Officer Vaughn that?

A Yes, sir.

Q When you were in the car and left the scene, did you folks go through a red light?

A Yes, sir.

[fol. 653] Q All right. Now, do you recall the time of your arrest?

A Yes, sir.

Q Where was it; was it at the Casa Blanca Bar?

A Yes, sir.

Q I believe Officer Vaughn was there; is that right?

A Yes, sir.

Q Did you have the revolver in the Ford automobile at that time?

MR. GORDON: Your Honor, object to this on the grounds it is improper cross examination. I did not go into any of the matters subsequent to the offense.

THE COURT: The objection is overruled.

THE WITNESS: Would you read the question?

Q BY MR. WARNBERG: Did you have the revolver in the back of that Ford?

A Yes, it was there.

Q Had you just left Harrington off some place?

A Yes, sir.

Q Where did you leave him?

A On Rosecrans and Vermont.

Q Whose car was it?

A Harrington's.
Q All right.
Now, did Officer Vaughn, when he questioned you, ask [fol. 654] you this question and you gave this answer:

"At any time while you were inside this market did you have a gun of any type in your possession or in your hand?"

And you answered, "Yeah, I had one."

A Yes, sir.
Q Is that true?
A Yes, sir.
Q Then Officer Vaughn asked you what kind did you have and you said, "I had a .22."
A Yes, sir.
Q Then Officer Vaughn asked you, "Would that be the same .22 that the officers recovered last night?" and you said, "Right"?
A Yes, sir.
Q Mr. Rhone, is that what happened?
A Yes, sir.
MR. WARNBERG: That's all, your Honor.
MR. GORDON: May I ask a question, please?
THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. GORDON:

Q Now, that .22 that you just got through being asked about, where did you get that .22?
A What do you mean?
[fol. 655] Q When did you first come into possession of it?
A In the store.
Q Speak up, now, so I can hear you.
A In the store there.
Q That is in the restaurant—or, the liquor store?
A Yes, sir.
Q And who did you get it from?
A Harrington.

Q And how did you happen to get it from Harrington in the liquor store?

A I took it from him.

Q And why did you take it?

A I don't know exactly.

Q Keep your voice up, please.

A I don't know exactly. I just didn't want nobody to get hurt.

Q You took it from Harrington there in the liquor store on December the 11th?

A Yes, sir.

Q And this was the gun that you told the officers that you had in the liquor store?

A Yes, sir.

Q But you did not go into the liquor store with that gun?

A No, sir.

[fol. 656] Q Now, do you remember hitting the lady's wrist there in the liquor store?

A I grabbed her wrist.

Q Was your taking of the gun from Harrington before that incident or afterwards?

A It would have to be afterwards.

Q It was afterwards?

A Yes, sir.

Q Now, one incident; one question, when this lady reached and pulled for this gun did she get the gun out of the drawer that she had reached for?

A Yes, sir.

Q Did she have the gun aimed at anybody?

A She was swinging it—

Q Would you show us just about the way she had it?

A She was swinging it towards the back where the scuffle was.

Q Was she swinging it back and forth like you are showing?

A No, she just grabbed it and I was aiming it, like that.

Q Who was she aiming it at?

A I thought she was aiming it at Jesse.

Q Is that why you grabbed her arm?

A Yes, sir.

MR. GORDON: All right, no further questions.

[fol. 657] THE COURT: Anything further, gentlemen?

MR. WARNBERG: I believe that's all.

THE COURT: Pardon?

MR. WARNBERG: That is all.

THE COURT: Ladies and gentlemen, I am going to ask the witness a few questions. I don't want you to infer or to speculate that I have any opinion with respect to the guilt or innocence of this defendant or any of the defendants by my asking questions. It is merely that I feel certain things, perhaps, have not been brought out. I would like as much information to come to the jury as possible, and that is my only reason for asking questions.

EXAMINATION

BY THE COURT:

Q Mr. Rhone, when you thought that this woman was going to shoot Jesse—you saw her sort of swing the gun over pointing at him?

A Yes, in that motion.

THE COURT: Keep your voice up loud, don't just talk to me.

THE WITNESS: Yes, sir; yes, sir, in that position.

Q. BY THE COURT: All right. So, at that time were you also looking at Jesse?

A Well, no, I think somebody touched me when she grabbed the gun. Somebody touched me—

[fol. 658] MR. GORDON: I can't hear you.

THE COURT: I can't hear you, either.

THE WITNESS: Somebody touched me when she grabbed the gun and said, "Look." I looked around and she had the gun out and was aiming it towards Jesse.

Q BY THE COURT: How do you know she was aiming it at Jesse?

A I figured because the scuffle had started back there.

Q Could you see Jesse at that time?

A Only out of the corner of my eye.

Q What portion of his body did you see out of the corner of your eye?

A I can't remember that, if I seen him even clearly. I didn't see him clearly.

Q You didn't see him clearly?

A No, sir.

Q Do you know where, approximately, in the store, sir, that he was at that time?

A He was in the rear portion of the store.

Q Rear portion?

Now, look at that diagram that is People's 4. The very rear portion there is a cooler; that is the farthest—

A No, he wasn't—

Q —spot back there, or the door where it says "E". [fol. 659] That is the very back end of the store.

Can you tell me where he was approximately? Does the diagram make sense to you, sir?

A Yes.

Q I don't want to confuse you.

A It looks familiar.

Q Make sure; I want to make sure before I ask you any questions.

You notice at the front it says: "Screen door" and to the left it is "Cigar case, candy case," and goes on and says, "Cash register" back of the candy case, and says: "Refrigerator" and goes back to the back door, and then there is a back door back there.

A Yes, sir.

Q Does it look familiar at all to you, sir?

A Yes, sir.

Q Now that you have familiarized yourself with People's 4, can you give me an approximation of where Jesse was at the time you say you saw him through the corner of your eye?

A I would say it was close to the shelves.

Q Do you want to step down—and you may mark it, take a piece of that crayon, sir.

A I don't know if I can mark it, I just said—

Q Well, you can point it approximately, can't you?

[fol. 660] A Right in here somewhere.

Q Do you want to take that green piece of crayon there to your right and put a little circle there, just approximately. Make it a little darker, please, or otherwise we wouldn't be able to see.

A Right in here, sir.

Q Thank you, you may be seated.

All right, sir, now, you also said that while you were in there you took the gun from Harrington.

A Yes, sir.

Q You took a gun from Harrington; is that right?

A Yes, sir.

Q What did you do with it after you took it from Harrington?

A I didn't do nothing with it.

Q Well, did you hold it in your hand, put it in your pocket, throw it away; what did you do with it? You had to do something with it.

A I might have held it in my hand.

Q Keep your voice up, please, sir.

A I think I held it in my hand until—

Q In which hand did you hold it, sir?

A In my right, I believe.

Q All right. Did you point it at anybody?

A No, sir.

Q What was your purpose in taking it?

[fol. 661] A Like I said, I didn't want nobody to get hurt.

Q Well, did you do anything with the gun to stop anyone from getting hurt?

A No, but I felt better that it was in my hands.

Q Did you say anything to anyone to stop them from being hurt at that time, sir?

A No, sir, everything happened so fast.

Q All right.

Now, let's go back a little bit to the time when you came from your house after you talked with the other three people you said you talked to, and you said you drove in two cars to some place where you left the Ford; is that correct?

A Yes, sir.

Q And then you got into Gil's car, the four of you, and drove to the market; is that right?

A Yes, sir.

Q What was the reason for your leaving the Ford there and going to the market in the other car?

A We didn't want the both cars to be spotted.

Q All right.

Now, back at the place, sir, you say that you met about 10:00 o'clock in the morning at your house?

A Yes, sir.

Q And you said, as I understand your testimony, that you talked about how much money you could get at the [fol. 662] market; right?

A Yes, sir.

Q That you had to do it on a Friday because that is the day they cashed checks?

A Yes, sir.

Q And you also talked about guns?

A Yes, sir.

Q Now, tell me this, sir, who was it that said what about the money? In other words, which one of the persons there said something about money?

A Well, it was Jesse.

Q What did he say about money?

A He just said how much he thought would be in the place.

Q What did he say?

A I don't remember exact figures.

Q Do you have any present recollection on how much was talked about, sir?

A Oh, maybe two, $3000, something like that.

Q Did any of the other people there say anything?

A Well, there was conversation back and forth.

Q Do you remember what the defendant Cooper said, if anything, sir?

A No, sir, I can't recall.

[fol. 663] THE COURT: Did the Defendant Cooper say anything about the fact that he had cashed checks at that place before?

THE WITNESS: Yes, sir.

THE COURT: Did the Defendant Bosby say that he cashed checks at that place before?

THE WITNESS: Yes, sir.

THE COURT: Now, sir, you said there was also some discussion about guns, is that right?

THE WITNESS: Yes, sir.

THE COURT: All right. Now, who said what about guns?

THE WITNESS: I don't recall exactly what was said.

THE COURT: I didn't ask you what was said, sir, but as to who said it. Do you know who mentioned guns, who talked about guns?

THE WITNESS: Well, we all did.

THE COURT: Now, can you recall anything that was said about the guns, sir?

THE WITNESS: No, sir, nothing specifically.

THE COURT: When was the first time on December 11th, sir, that you saw any gun?

THE WITNESS: The first gun I seen was the one that the lady grabbed from the cash register.

THE COURT: I don't mean in the market, sir.

Did anyone show any guns before you got to the mar-
[fol. 664] ket?

THE WITNESS: No, sir.

THE COURT: Did anyone say, "I've got a gun" or "I know we have got two guns" or "Let's go now," or anything to that effect?

THE WITNESS: Yes.

THE COURT: Who said that?

THE WITNESS: Well, Jesse said he had a gun. And Harrington had a gun.

THE COURT: Did Harrington say he had a gun?

THE WITNESS: I don't know whether he said it.

THE COURT: Did something lead you to believe that Harrington had a gun there while you were there at the place?

THE WITNESS: Well, it was just understood that it was two guns.

THE COURT: All right. Have you ever been called Charles?

THE WITNESS: No, sir.

THE COURT: Well, sir, you heard a statement read by Sergeant Vaughn. He read that statement that he said that you made on Sunday afternoon at 4:40 p.m., December 13, 1964.

THE WITNESS: Yes, sir.

THE COURT: You heard that read from the witness stand?

[fol. 665] THE WITNESS: Yes, sir.

THE COURT: And at the very end of the statement, sir, it says:

> "Q. Has everything that you have told us in this statement been the truth, to the best of your knowledge?"
>
> And your answer was, "Yes, sir."

Is that still your statement, sir, that everything that you said in that statement is true?

THE WITNESS: To the best of my knowledge. Of course, I was kind of shook up at that time.

THE COURT: Well, sir, have you had a chance to read the statement in addition to hearing it from the witness stand before you got up to testify?

THE WITNESS: Yes, sir.

THE COURT: Did you read it once or more than once, sir?

THE WITNESS: I read it more than once.

THE COURT: How many times did you read it before you got up to testify?

THE WITNESS: Maybe twice.

THE COURT: Maybe twice?

THE WITNESS: Yes, sir.

THE COURT: So that by hearing it from the witness stand is really the third time that you either read it or heard it, is that correct?

[fol. 666] THE WITNESS: Yes, sir.

THE COURT: Is there anything, sir, that from hearing it or reading it in that statement that you now feel is not the truth?

THE WITNESS: No, sir. There's a few statements

in there that I don't know if I made them or not. I don't remember making them.

THE COURT: Do you remember which statements you saw that you don't remember making, sir?

THE WITNESS: I couldn't point them out. I'd have to read it.

THE COURT: Well, I think it is important, and I think that you ought to have the opportunity to do that.

It is late now, but your counsel has a copy of the statement, and I suggest, sir, that you read it again and mark any statements that you believe that you are not sure that you made. If you want to explain it, you have the right to do that. Do you understand?

THE WITNESS: Yes, sir.

THE COURT: All right. You do that, and then tomorrow morning you will have an opportunity to resume the stand and do that.

We will recess at this time until 9:45 tomorrow morning.

Remember the admonition, ladies and gentlemen, that you are not to discuss this case among yourselves or with [fol. 667] anyone else on any subject connected with the trial. You are not to form or express an opinion with respect to the case until it has finally been submitted to you for your decision.

(Whereupon the afternoon adjournment was taken at 3:55 o'clock p.m. until 9:45 o'clock a.m., Friday, June 25, 1965.)

[fol. 668]

LOS ANGELES, CALIFORNIA
FRIDAY, JUNE 25, 1965: 9:40 A.M.

(The following proceedings were had in open court, outside the presence of the jury:)

THE COURT: The record may indicate the defendants and each of them are present with counsel, outside the presence of the jury.

Mr. Moore, I understand you have a motion?

MR. MOORE: Yes, your Honor.

At this time the defendant Cooper will move for a mistrial based upon your Honor's cross examination of Mr. Rhone.

It is my feeling that the extent and the field that your Honor went into caused prejudice to each of the defendants. That as long as there is an adversary court proceedings, it is my understanding of the proceedings, that the Court should not inject itself, even with good intentions, into the position of perhaps being an advocate.

It is my feeling that since your Honor—the pages here, looks like over ten or twelve pages of testimony—went into this examination of Mr. Rhone as to not only his statement, but other matters involving each of the other defendants, I respectfully submit that this is prejudicial to each of the defendants, and I move for a mistrial upon that basis.

MR. WALTON: I join for Harrington.

[fol. 669] MR. ROSEN: I will join, your Honor.

THE COURT: Join, too, Mr. Gordon?

MR. GORDON: No, I do not, your Honor.

THE COURT: Gentlemen, the motion will be denied.

I will just state for the record that it was not my intention to cross examine the defendant. I don't think I cross examined him. It may seem that way to you because of some of his answers.

But it was never my intention to cross examine. I didn't think that the tone of my voice or the way I asked the questions or the types of questions asked was done with a view of anything but eliciting evidence in the case.

Anything further?

MR. MOORE: No, your Honor.

THE COURT: As soon as the testimony is over, I would like to have a conference with respect to instructions before we start argument in the matter.

You may bring in the jury.

[fol. 670] THE COURT: Mr. Rhone, do you wish to resume the stand?

THE CLERK: You are still under oath. Will you state your name for the record, please.

The Witness: George Rhone, Jr.

GEORGE RHONE, JR,

a defendant herein, called as a witness by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

THE COURT: Mr. Rhone, at the conclusion of the session on yesterday I believe that I mentioned to you that you could take the transcript of the statement that you gave to the officers with you and read it; is that correct?

THE WITNESS: Yes, sir.

THE COURT: Have you done so, sir?

THE WITNESS: Yes, sir, I went through it.

THE COURT: Having done so, are there any statements in there that you believe that you didn't make or you don't remember making or anything that you wish to correct, sir?

THE WITNESS: Yes, sir. There is a few statements in here—I am not saying I didn't make them, but I don't remember making them.

THE COURT: All right, sir, do you want to point those out, please, and read them?

THE WITNESS: Yes. There is one on page 7, line [fol. 671] 5, for example, I just want to read it: it says, well,

> "Q What did Jesse do in the scuffle?
>
> "A Well, I couldn't say exactly what he did in the scuffle because I was watching, like I said, all I knew is they were scuffling back there."

And on page 10—

[fol. 672] THE COURT: Well, what about that statement, sir? What do you want to say?

THE WITNESS: What I'm trying to say is that the time of the statement I was confused in being interrogated for this. I mean, I was frustrated. I don't know how many of you have been interrogated for murder, but it's no fun.

And what I'm trying to say is, they had—the questions that came, they came fast, and I was trying to give straight and direct answers.

And then on page 10, line 3, they asked the question, "But at the time the shot rang out, you saw Jesse and the old man scuffle?"

I said, "Yes."

But the question that I answered "Yes"—but, I mean, like I didn't even see it. Like it says over here on 7, I didn't even see the scuffle, actually.

THE COURT: All right, sir, go ahead.

THE WITNESS: And which I'm just trying to point out that during this interrogation, that they were trying to confuse me, and in some places they did succeed in confusing me.

For instance, on page 8, line 19, it says, "What did Cooper do with the gun?

> "A I don't know anything about that, either. I didn't see it no more after that."

[fol. 673] Then on down he asked me the same question, at line 26, "And what did Cooper do with the gun after that?"

And I said, "I don't know what happened to it."

I'm just showing that they were asking questions over and over again, trying to cross me up some way.

And at the beginning of the statement, at line 8, when the question: "Mr. Rhone, will you state your full name, please? You will have to talk loud enough so this gentleman over here can hear you."

I said, "Wait a minute. Before I say anything, I want to ask you a question."

And it says, "BY SGT. VAUGHN: Sure, go ahead."

And they say, "Do you want him to stop?" Meaning the recorder, do I want him to stop the recording machine.

So he stopped it. And I asked him if it's possible that I can go to the gas chamber for this.

And he said—well, they looked at each other as if shocked because I asked that question.

And he said, "If you tell the truth, Rhone," he said, "The truth never hurts anyone."

So I tried my best to tell the truth in the statement.

But I would like to say there's a lot of things in here that he asked me that were direct questions and there [fol. 674] was no chance for me to elaborate on anything.

THE COURT: Well, sir, do you want to elaborate on anything now? You have that opportunity. And you're telling me that you couldn't then. Do you want to now? Is there anything else that you want to say?

THE WITNESS: Yes, sir, I'd just like to tell what happened.

THE COURT: All right, sir. Go ahead. If that is what you want to do, go ahead.

THE WITNESS: Well, at the beginning, I think Harrington come over to my house and we ate breakfast there that morning.

A little later on in the morning, about 10:30, 11:00 o'clock, Jesse Bosby and Gilbert Cooper come over to my house.

I think we ate breakfast; my sister had made breakfast for us.

And we had a conversation there about this market. It wasn't exactly planned when we was supposed to do this or nothing.

And since Gilbert Cooper had picked his check up that day, we thought it would be a good opportunity to go down, since he had the check, and see exactly if it was exactly like Bosby said it would be.

So we went to this neighborhood in the vicinity of the market, and they let us out, they let me and Harrington [fol. 675] out, I don't know, maybe a block or two away from this market.

So Harrington and I went into the cleaners there on the corner, and Harrington asked the man in the cleaners if he can have his suit—if they did alterations on his suit, because he had a suit in his car that he just had bought, and I believe it was the same suit he was wearing.

And the man said that he didn't do alterations there, that he would have to take it downtown somewhere.

I think we stayed in there maybe four or five minutes. And when we come out, I seen Gilbert Cooper's car parked about a block and a half away.

[fol. 676] So on the way towards the car Cooper comes out, I don't think he noticed this, and got his check. He went back in and I remember Harrington asked me if I need any cigarettes. I said, "No."

He said, "Well, I need a pack."

I said, "Well, we'll check it out, then." So I went in and I don't think we were in over forty-five seconds, I don't think it was a minute before everything just broke loose; and I know there was a scuffle, but I didn't exactly see it, but I knew it was a fight going on, and the next thing I know someone tapped me on the shoulder and said, "Hey, look, man."

I looked around and I seen this lady grab the gun from the cash register, so I reached over and grabbed her arm because she looked like she was going to shoot somebody. I think she was going to shoot Jesse because she was pointing it towards that direction where the scuffle was coming from and, anyway, by the time I grabbed the gun then the shot went off, and I don't know exactly what happened, everybody just running around, and we all left the store.

We got into Cooper's car and we went over to Harrington's car and we all left.

THE COURT: Is that all you want to say, sir?

THE WITNESS: Yes, sir. I just wanted to say that there wasn't supposed to be a planned robbery that day. [fol. 677] We hadn't even seen the place. When I went in there was no intention to rob the place, it was only to look it over.

THE COURT: All right.

Mr. Rosen, do you have any questions?

MR. ROSEN: Yes.

CROSS EXAMINATION

BY MR. ROSEN:

Q Mr. Rhone, with regard to the statement that you made to Officer Vaughn, do you remember listening to it? It is the one you read and have a copy in your hand.

A Yes, sir.

Q Now, this statement started out at 4:40 in the afternoon of December the 13th; is that right?

A I believe so.

Q That is what it says on the statement, doesn't it?

A Yes, sir.

Q And Sergeant Vaughn asked you your name and you said, "Wait a minute, before I say anything I want to ask you a question"?

A Yes, sir.

Q Is that the way it happened?

A Yes, sir.

Q And then Sergeant Vaughn said, "Sure, go ahead," and Sergeant White said, "Do you want him to stop?"

[fol. 678] Do you see that in your statement there?

A Yes, sir.

Q What did Sergeant White mean, to your knowledge, when he said, "Do you want him to stop?"

A He meant the reporter that was—

Q The shorthand reporter?

A Yes, sir.

Q And when Sergeant White asked you that you said, "Yes"?

A Yes, sir.

Q Then you went off the record for five minutes?

A Yes, sir.

Q Is that right?

A Right.

Q Now, you told us here this morning that at that time you asked the officers, "Well, can I go to the gas chamber for what I have done here?" something like that; is that right?

A I asked them, I said, "Is it a possible chance I can go to the gas chamber for this?"

Q All right.

You folks talked there for five minutes before you went back on the record?

A Yes, sir.

Q Do you remember that part of the conversation?

A Yes, sir, I believe so.

[fol. 679] Q Who answered that question about the gas chamber?

A I don't know. There was three officers there and when I asked the question they looked at each other. It took them awhile to answer.

Q Did one of them answer it?

A Yes, sir. I don't know which one, though.

Q All right.

What did that officer say?

A He said that, "Just tell the truth," he said, "the truth don't hurt nobody."

Q "The truth don't hurt nobody"?

A Yes, sir.

Q Is that what the officer said?

A Yes, sir.

Q Well, what else was said about that?

A Then I said, after he said that, "There is a possible chance that you can get the gas chamber," then I told him that I don't want to answer any questions; but the conversation went on and I finally agreed to answer the questions.

Q Well, when he said, "The truth don't hurt nobody"—

A Yes, sir.

Q What did you understand him to mean by that, with regard to your question about whether or not you [fol. 680] could go to the gas chamber for this?

A Well, I thought if I tell him the truth that the truth, as I saw it—well, I don't know.

Q That you would not go to the gas chamber?

A I may have, yeah.

Q Well, did you understand the question, that question, by that question that you asked the officers about the gas chamber and their answer, did you understand by that that they meant that if you told them the truth you would not go to the gas chamber?

Did you understand that by what they said?

A Yes, sir. I thought, well, he said, "The truth won't hurt anyone."

Q I know what they said, but I want to know what you thought that meant.

A Well; I guess I thought it meant I wouldn't go to the gas chamber.

Q If you told the truth?
A Yes, sir.
Q And is that the reason that you went on and made the rest of your statement?
A Well, I have a reputation for telling the truth, anyway.
Q Just answer that question: is that the reason that you went on and made the rest of the statement, because of what the officer said about your telling the truth?
[fol. 681] A Well, that, yes, partly.
MR. ROSEN: That's all.
THE COURT: Mr. Moore, any questions?
MR. MOORE: No questions.
THE COURT: Mr. Walton?

CROSS EXAMINATION

BY MR. WALTON:

Q Mr. Rhone, when the shot was fired, you had a gun in your hand; is that correct?
A I believe I did.
Q You didn't fire the shot, did you?
A No, sir.
Q Okay.
You had a gun in your hand; is that right?
A Yes, sir, I believe so.
Q Do you know which gun you had in your hand, between the two here, the long one—may I have the exhibits—
Mr. Rhone, I am showing you People's 6 and People's 7. Did you have one of these guns in your hand when the shot went off?
A Yes, sir.
Q Which one?
A It was this one here.
Q The big one?
[fol. 682] A Yes, sir.
Q People's 7?
A Yes, sir.

Q Did Cooper have a gun in his possession, that you know of?

A The other gun, I don't know if that is the one, but the once that the lady had, he had grabbed that out of her hand.

Q He had the gun that was taken from the lady; is that correct?

A Yes, sir,

Q And Bosby had a gun, too, that you knew of; is that correct?

A I believe he did.

MR. WALTON: I have nothing further.

THE COURT: Mr. Gordon, do you have anything further?

MR. GORDON: No questions, your Honor.

THE COURT: Mr. Warnberg, any further questions, based upon the testimony this morning?

CROSS EXAMINATION

BY MR. WARNBERG:

Q Did the officers treat you all right?

A Yes, sir.

Q In other words, you were asked, "How have you been treated?" and you said, "Okay"?

[fol. 683] A Yes, sir.

Q And they asked you, "Has anyone used any force or threats of violence or force upon your person to get you to make any of these statements?" and you said, "No"?

A Yes, sir.

[fol. 684] Q Is that right?

A Right.

Q And you were asked, "Has anybody made you any promises of reward or immunity to get you to make this statement?" And you said, "No"?

A Yes, sir.

Q And you were asked, "Has this statement been made of your own free will and accord?" And you said, "Yes"?

A Yes, sir.

Q You were asked, "Has everything that you have told us in this statement been the truth, to the best of your knowledge?" And you said, "Yes"?

A Yes, sir.

Q When you were talking about this robbery, where were you, at your apartment?

A At my sister's house, yeah.

Q Is that that Spruce Street address?

A Yes, sir.

Q 635 Spruce Street in Compton?

A 535.

Q 535 Spruce Street in Compton?

A Yes.

Q And then did you talk about what you were supposed to do in the robbery?

A No, sir.

[fol. 685] Q Were you supposed to watch?

A Yes, sir, if the robbery took place.

Q What were you supposed to do?

A What do you mean?

Q What were you supposed to do in the robbery?

A I was supposed to watch.

Q From the inside or outside?

A From the inside.

Q Who were you supposed to watch?

A Nobody in particular.

Q You were supposed to watch to see that the robbery went on all right?

A Yes, sir, I believe so.

Q You did drive by the place, the market, first, did you not?

A Once we went by, yes, because I had never seen the market.

Q What time did you do that?

A I couldn't say what time it was.

Q That is after you left your sister's place?

A Yes.

Q Who were you with when you drove by the first time?

A I think we were all together.

Q You were all together when you drove by the first time?

[fol. 686] A I think so, yes.

Q Where did you go then?

A About a block or two, a block and a half, north of the place.

Q Where you had the other car?

A No, sir.

Q In other words, you just drove about a block away and then you came back or what?

A No, sir. We drove a block away and Harrington and I got out.

Q I think you told us yesterday you went about three or four blocks away. Is that about it?

MR. GORDON: Now, your Honor, I make this objection, if your Honor please—

THE COURT: Sustained.

MR. WARNBERG: All right.

MR. GORDON: And the extensiveness of the cross exam; your Honor took the witness and went into matters. But I think counsel now is trying to reopen his cross examination that he abandoned yesterday.

MR. WARNBERG: I'm not.

Q Where were you standing in the market?

A Just inside the door.

Q By the shelves?

A Yes, sir.

Q Did you ever leave that position?

[fol. 687] A Yes, sir.

Q When?

A When the lady grabbed the gun.

Q Were you standing at the shelves when you saw her take the gun?

A Yes, sir.

Q She was behind the cash register then, is that right?

A Right.

Q Is that right?

A That's right, yeah.

Q So that we understand each other, are you familiar with the drawing?

A Yes, sir.

Q She is standing by the cash register?

A Yes, sir.

Q You are standing by the shelves?
A Yes, sir.
Q Will you put an X there—no, let's see—maybe put an "R" where you were standing by the shelves.

(Witness complies.)

Q All right. Now, Mr. Rhone, you were standing at point R when you saw her grab for the gun?
A I didn't actually see her. Somebody touched me and said, "Look."
THE COURT: Excuse me. Now, there are two R's, I [for. 688] notice, on the diagram.
MR. WARNBERG: Yes, I didn't notice that.
THE COURT: Will you mark an R-2 there by the R which the witness just placed, which is the one by the shelves.
MR. WARNBERG: Yes, your Honor. May I mark that R-2.
Q You were at position R-2?
A Yes, sir.
Q Who tapped you on the shoulder?
A I think it was Glen.
Q In other words, you and Harrington were standing together then?
A No, not exactly. This diagram looks big, but actually it's congested in the store; it's a very small store.
Q Well, somebody tapped you, is that right?
A Right.
Q And you say it's Harrington?
A Yes, sir, I believe so.
Q Then you looked up?
A Yes, sir.
Q What did you see?
A I seen this lady grab a gun.
Q Who was there then?
A Where?
Q Who was there in the market besides you, Glen, and the lady?
[fol. 689] A There was—Gil was there, and there was the man behind the counter.
Q Where was Gil?
A I guess around the candy case somewhere.

Q Then what did you do?

A Then I reached over and grabbed her arm, her wrist.

Q In other words, you had to move from position R-2 all the way over to the cash register to do that?

A That's right.

Q All right. Did Gil take the gun?

A I believe he did.

Q Was there some talk at the apartment about the lady having gone to the bank that morning?

A Yes, sir.

Q What was said about that?

A Well, it was just understood that she did go to the bank on Fridays. I don't know exactly what was said.

Q In other words, they said on a Friday she goes to the bank to get a lot of money?

A Yes, sir.

Q She does that some time Friday morning?

MR. GORDON: These questions have all been asked and answered.

THE COURT: Sustained.

[fol. 690] Q BY MR. WARNBERG: All right. You did see Jesse hit the old man?

A Well, I seen a fight; I seen them hitting each other.

Q You saw Jesse hit the old man with a gun, did you not?

A Well, like I say, I couldn't be so sure if it was a gun or if it was a can or—I don't know what it was. I didn't see it directly. It was indirectly that I seen it. I mean, it was out of the corner of my eye.

Q Well, I will ask you once more. You told Officer Vaughn, did you not, that you saw Jesse hit him with a gun?

A I believe that is in the statement, yes.

Q Isn't that true?

A I can't say it was true or not. It may have been a gun, but it may not have been. I don't know.

Q Did you tell us that the statement is true?

A Yes, sir.

MR. ROSEN: Your Honor—

MR. GORDON: I will object—

MR. ROSEN: —I will object—

MR. WARNBERG: All right, that's all, your Honor.
THE COURT: Any further questions, gentlemen?
MR. GORDON: Yes, your Honor.
[fol. 691]

REDIRECT EXAMINATION

BY MR. GORDON:

Q Mr. Rhone, in looking at that diagram, you were standing by shelves. Now, Counsel has marked "shelves" at the place R-2.

There were other shelves here by the front door. Will you step over and show us where you were as you were standing in the store? Step over to the diagram, please.

A I was standing about right here (indicating).

MR. GORDON: All right.

THE COURT: Indicating at the place "shelves" where there is an R, and then a line, and then a smaller R-2.

Q BY MR. GORDON: How many feet would you say that those—where you were standing was from the cash register, Mr. Rhone?

A It's a very short distance. I don't know if I can—

Q Well, would you say that it would be any farther than I am from you?

A No, sir, I wouldn't.

Q It would be, you think, about this distance?

A Yes.

MR. GORDON: May the record indicate, your Honor?

THE COURT: I would say six or seven feet.

MR. WALTON: Your Honor, if I may interrupt a [fol. 692] moment. There appear to be two R-2's on the diagram, and I feel that the record might be confusing for that reason.

In the upper portion just behind the refrigerator there is an X with an R-2 marked out at the margin.

THE COURT: Well, you are correct. I didn't notice that.

What we are referring to by the place that Mr. Rhone has marked on the diagram is the place indicated "shelves," which is right next to the portion marked "freezer."

I don't think there can be any confusion as long as we have indicated that.

MR. GORDON: Thank you very much.

Q Mr. Rhone, when you were being questioned, were you suffering from any little disability?

A Well, ever since from that date that it happened I had been drinking. I drank, I guess, so I wouldn't have to think about what actually happened.

But I had been drinking up until the time that I was arrested in this bar.

Q You were arrested in a bar?

A Yes, sir.

Q And were you drinking at the time you were arrested?

A Yes, sir.

MR. GORDON: All right. No further questions.

[fol.693] THE COURT: Further cross?

(No response.)

THE COURT: You may step down, sir.

Anything further, Mr. Gordon?

MR. GORDON: No, your Honor.

THE COURT: Do you rest?

MR. GORDON: Defendant Rhone rests.

THE COURT: Will there be any rebuttal, Mr. Warnberg?

MR. WARNBERG: No rebuttal, your Honor.

THE COURT: Ladies and gentlemen, you have heard the entire case. We are going to take a short recess now and discuss some matters of law, after which you will hear argument of counsel.

Depending on when counsel finish the argument, I will instruct you. It is likely that it will not be today, it will probably be Monday morning.

At any rate, I will admonish you again that you are not to discuss this case among yourselves or with anyone else on any subject connected with the trial. You are not to form or express an opinion with respect to the case until it has finally been submitted to you for your decision.

Please wait in the jury room until we have concluded our discussion.

[Discussion—Jury Instructions (omitted in printing)]

[Argument in the Case by Mr. Warnberg (omitted in printing)]

[Argument by Mr. Rosen on Behalf of Mr. Bosby (omitted in printing)]

[Argument by Mr. Walton on Behalf of Mr. Harrington (omitted in printing)]

[Argument by Mr. Gordon on Behalf of Mr. Rhone (omitted in printing)]

[Argument by Mr. Warnberg on Behalf of the People (omitted in printing)]

[Instructions to Jury (omitted in printing)]

[Reporter's Transcript—June 25, 28, 29 and 30, 1965 (omitted in printing)]

[Verdicts (omitted in printing)]

[Reporter's Transcript—July 1, 2, 6, and 28, 1965 (omitted in printing)]

[Penalty Trial (omitted in printing)]

[Offer into Evidence, People's Exhibits 15-17 (omitted in printing)]

[Testimony of Joseph Henderson (omitted in printing)]

[Testimony of Gladys Donaldson (omitted in printing)]

[Testimony of Essie Turpin (omitted in printing)]

[Testimony of Essie Garmon (omitted in printing)]

[Testimony of Christopher Jones (omitted in printing)]

[Testimony of Lucille Harrington (omitted in printing)]

[Testimony of Joseph Paul Harrington, Jr. (omitted in printing)]

[Testimony of Lucille Harrington (recalled) (omitted in printing)]

[Penalty Verdicts (omitted in printing)]

[Motion for New Trials and Denial Thereof (omitted in printing)]

[Sentence (omitted in printing)]

GLENN MARTIN HARRINGTON
Booking No. 174107
Tank No. 1200-1
Los Angeles County Jail
Hall of Justice
Los Angeles, California

In Propria Persona

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. 298977

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

—*v*—

GLENN MARTIN HARRINGTON, DEFENDANT

Filed, Aug. 6, 1965, William G. Sharp, County Clerk,
By Marcellah Proctor, Deputy

NOTICE OF APPEAL

To the clerk of the above-entitled court:

YOU WILL PLEASE TAKE NOTICE that the defendant Glenn Martin Harrington hereby appeals to the District Court of Appeal, Second Appellate District, from the final judgment rendered against him herein in Department 110 of the above-entitled court, the Honorable Joseph A. Wapner, Judge presiding on the 28th day of July, 1965.

Dated: August 5, 1965, at Los Angeles, California.

/s/ Glenn Martin Harrington
GLENN MARTIN HARRINGTON

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION TWO

2nd Crim. No. 11579

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND RESPONDENT

vs.

JESSE BOSBY, GILBERT COOPER, GLEN MARTIN HARRINGTON and GEORGE RHONE, JR., DEFENDANTS AND APPELLANTS

OPINION—November 21, 1967

APPEALS from judgments of the Superior Court of Los Angeles County. Joseph A. Wapner, Judge. Affirmed.

Patrick J. Sampson, under appointment by the Court of Appeal, for appellants Jesse Bosby, Gilbert Cooper and George Rhone, Jr.

William V. Shannon, Jr., under appointment by the Court of Appeal, for appellant Glen Martin Harrington.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and James H. Kline, Deputy Attorney General, for respondent.

Each of the defendants Bosby, Cooper, Harrington and Rhone has appealed from the judgment entered upon the verdict of a jury finding him guilty of murder in the first degree.[1] The jury fixed each appellant's sentence at life imprisonment.

Appellants contend (1) that their extrajudicial statements were obtained without compliance with the rules

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[1] At the time of oral argument, this court was advised by counsel that appellant Cooper had died on May 21, 1967, during the pendency of this appeal. Thereafter, respondent's motion to abate appellant Cooper's appeal, supported by a certified copy of the certificate of his death, was granted.

enunciated in *Miranda* v. *Arizona*, 384 U.S. 436; (2) that their extrajudicial statements were not edited to prevent "cross-examination" as required by the retroactively applicable standards established in *People* v. *Aranda*, 63 Cal. 2d 518; and (3) that the court erred in instructing on premeditated murder when, absent the application of the felony-murder doctrine, the evidence was insufficient to sustain a verdict of first degree murder. We find no merit in these contentions.

The evidence is without material conflict. Defendants Bosby, Cooper and Harrington offered no defense, neither testifying themselves nor calling any witnesses to testify in their behalf. Defendant Rhone did take the stand but his version of the events in issue did not differ in any substantial way from that presented by the prosecution.

In summary, the evidence in support of the judgment establishes that appellants were seen to transfer from one car to another a short distance from the combination liquor and grocery store owned and operated by Mrs. Robbins and her brother, Darrell Ashcraft. The time was approximately 2 p.m. on Friday, December 11, 1964, when Mrs. Robbins would have a large amount of cash on hand to enable her to cash the pay checks of the employees of the several businesses located near her store.

Appellants Cooper and Bosby entered the store at or about the same time. Cooper asked Mrs. Robbins if she would cash a pay roll check. She indicated that she would but would have to examine it first. Cooper, after reaching into his pocket, stated that he must have left his check in his car and went outside to get it. In the interim, Bosby engaged Mr. Ashcraft in conversation regarding a particular size bottle of wine. When Cooper returned he was accompanied by Harrington and Rhone who took positions within the front of the store. Mrs. Robbins remembered seeing them a few moments earlier outside her store recalling in particular Harrington's bright red hair.[2]

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[2] Apparently Rhone, Cooper and Bosby were readily identified as negroes while Harrington was originally described as either white or a very light-skinned negro.

Although Mrs. Robbins testified that the check presented to her by Cooper and the accompanying identification appeared to be in order, she intuitively felt something was amiss. As she expressed it: "Yes, he [Cooper] handed it to me and I looked at it and I knew it was a good check. I had cashed this company's checks before, but, I don't know, there was something about the way Mr. Rhone looked or something, I knew I wasn't going to open that box." By "box" she referred to a "check cashing register" in which the large sums of money were kept in addition to the regular amounts within the "main cash register."

At this point Mrs. Robbins heard and observed what appeared to her to be a "collision" between Bosby, who was in the rear of the store, and an elderly employee, Ben Serna. She testified that both men fell and when they arose she saw Mr. Serna moving towards her in a jerking fashion as if being prodded by Bosby whom she heard say, "Man, I told you not to give me any trouble."

While Mrs. Robbins' attention was diverted in the direction of Bosby and Mr. Serna, her brother, who could not see them from his position nearer the front of the store, observed Cooper and Harrington each draw a gun. Harrington told him to "Hold it." Mrs. Robbins testified that she continued to watch Bosby and Mr. Serna as they approached her, and observed that Bosby had a gun pressed against Mr. Serna's body. Mrs. Robbins then reached for her own gun which was kept in a drawer beneath the cash register but as she drew it out Rhone moved forward and seized her wrist and either he or Cooper removed the gun from her hand.

Mr. Ashcraft also saw his sister disarmed, and when he was told to move to the rear of the store, he complied and tried to push his sister on ahead of him. At this point a shot was heard and while Mr. Ashcraft could not see who fired the shot, Mrs. Robbins testified that she saw Bosby shoot Mr. Serna at point-blank range. Serna took a few steps forward with blood running from his mouth and shirt front and then fell dead upon the floor. Both Mrs. Robbins and Mr. Ashcraft complied with the orders to move to the rear of the store but in the confusion of

their exit the electric cord that supplied power to the register was pulled from its socket which prevented it from being opened. They exited through the rear of the store and when they returned appellants had departed.

Other witnesses saw appellants run to the car in which they had arrived and drive rapidly away, running a red light in the process. They were next seen moments thereafter when they again switched cars at the spot nearby where their second car waited with another man behind the wheel and the motor running.

The license number of the car used to leave the store was obtained by witnesses who had observed appellants' flight. Although appellant Cooper later asserted that the car "belonged" to him, it was registered to a third person in another part of Los Angeles. Subsequently, each of the appellants was arrested and each gave statements after being fully advised of their constitutional rights in accordance with the rules enunciated in *People* v. *Dorado*, 62 Cal.2d 338.

The statements of Cooper, Bosby and Rhone were tantamount to confessions that they were attempting to rob the store when the shooting occurred but each denied committing the murder itself. Each statement involved all four defendants. Harrington admitted only that he had driven to the market with three negroes but originally had remained in the car until he decided to follow them in order to purchase cigarettes. He admitted fleeing with "Jesse and Rhone" and spending the night with them in a motel in Pasadena where he dyed his hair from red to black and shaved off his moustache.

Appellants' initial assignment of error, of course, was based upon the hope that California would choose to apply the additional requirements of *Miranda* v. *Arizona*, *supra*, 384 U.S. 436, retroactively as *People* v. *Dorado*, *supra*, 62 Cal.2d 338, had applied the ruling in *Escobedo* v. *Illinois*, 378 U.S. 478. Unfortunately for appellants, but fortunately for society, our Supreme Court declined the option permitted by *Johnson* v. *New Jersey*, 384 U.S. 719, and restricted the application of *Miranda* to cases tried after June 13, 1966. (*People* v. *Rollins*, 65 Cal.2d 681, 683.)

Nevertheless, although the statements of each appellant were properly admissible in evidence against such appellant, they are correct in their contention that the trial court did not anticipate and conform to the new rules regulating the use of extrajudicial statements subsequently promulgated in *People* v. *Aranda*, *supra*, 63 Cal.2d 518, 530-531. The partial retroactivity of these rules was established in *People* v. *Charles*, 66 A.C. 325, 330-332. This error, however, does not require automatic reversal. In *People* v. *Lara*, 67 A.C. 367, 395-396, the Supreme Court most recently expressed itself in the following manner:

"The confession of each defendant implicated the other. On its face, this record shows a violation of the rules of practice declared in *People* v. *Aranda* (1965) *supra*, 63 Cal.2d 518, 528-531, which require the trial court to determine whether those parts of a confession implicating a codefendant can be effectively deleted without prejudice to the declarant, and if they cannot, to sever the trials or exclude the confession. It must be acknowledged that the present trial took place before *Aranda* was decided, and fully complied with the requirement of limiting instructions under the prior law. However, since the *Aranda* rules govern in all cases still pending on direct review (*People* v. *Charles* (1967) 66 A.C. 325 [57 Cal.Rptr. 745, 425 P.2d 545]), the admission into evidence of certain of defendants' unedited confessions constituted error. But *Aranda* makes it clear (63 Cal.2d at p. 527) that the error is reversible only if it causes prejudice. Here, as in *Charles*, each defendant's case was shattered in any event by the impact of his own detailed confession, and the fact that each was also implicated by his codefendant's confession cannot realistically have contributed to either conviction. In these circumstances, we are of the opinion that it is not reasonably probable that a result more favorable to defendants would have been reached had the *Aranda* rules been followed. (Cal. Const., art. VI, § 13; *People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

"We do not mean to imply that a violation of the *Aranda* rules will be automatically nonprejudicial as to any defendant who has made a confession of his own. In

every such case the issue remains whether the effect of any circumstances which might otherwise have mitigated the impact of the defendant's confession was overcome by the portions of a codefendant's statement implicating the defendant; in that event, the implication would be prejudicial despite the defendant's own confession. Such a situation might occur, for example, when the confessing defendant presented evidence to show his statement was not freely given, and also denied its truth on the witness stand. In the case before us, however, Lara made no such denial; on the contrary, he admitted he told the police the whole story of what had happened on the night of the killing." (See also our recent extended analysis of this aspect of *Aranda* in *People* v. *Wattie*, 253 A.C.A. 459, 468-470.)

As we have previously indicated, the evidence against each appellant, apart from his own extrajudicial statement and those of his codefendants, was exceedingly strong. Their identity as the parties involved in the events within the market is not disputed. Their switching of cars before and after their entry upon the premises had been established. Three of the party had drawn guns and were directing the victims to the rear of the store when the fatal shot was fired. Cooper had cashed checks in the market previously and the inference is virtually inescapable that the four appellants, acting in concert, had entered the market at that particular time and on that particular day of the week with the intention of forcefully stealing the large amounts of cash which then would be present on the premises. They were engaged in the attempt so to do when the killing occurred.

None of the appellants either "presented evidence to show his statement was not freely given, [or] denied its truth on the witness stand." (*People* v. *Lara*, *supra*, 67 A.C. at p. 396.) Rhone, the only appellant to testify in his own behalf, expressly conceded the free and voluntary nature of his extrajudicial statement and the overall accuracy and truthfulness of its contents. That is to say, Rhone testified that he and his codefendants had discussed the robbery in advance and the part each person was to play therein. They had definitely agreed that the robbery

would occur on a Friday when the greatest amount of money would be obtainable. He corroborated each of the events described by the prosecution's witnesses. Further, he confirmed the fact that a futile attempt had been made to open the cash register after the shooting.

The sole defensive thrust of Rhone's testimony was his contention that although he had agreed to commit the robbery if the conditions in the market were favorable and as described to him by Cooper and Bosby, nevertheless when the conflict between Bosby and Mr. Serna had occurred, he had not as yet reached a decision and therefore his participation did not amount to an *attempt* to rob. For example, on direct examination the following questions and answers are reported: "Q. Then, is it your statement that although you went into the store to pull a robbery, you didn't have one? A. Well, no, not exactly. We went into the store to look at it. You see, I hadn't even seen it yet. Q. I see. That is, you wanted to case the place? A. Right."

Under cross-examination concerning his earlier statement to the police, Rhone further clarified the limited nature of his later version of the situation, and then, in effect, destroyed any semblance of merit it might otherwise have presented: "Q. Then Officer Vaughn asked you, 'Did you and the previous persons I have just mentioned get together some place Friday and discuss or have a conversation pertaining to possibly robbing this market?' and you said, 'Yes, sir.' A. Yes, sir. Q. And he asked you, 'Approximately what time was that?' And you said, 'About noon'? A. Yes, sir. Q. He asked you, 'Where was that?' And you said, 'In Compton'? A. Right. Q. He asked you, 'At your sister's house?' And you said, 'Yes'? . . . A. Yes, sir. Q. And then the officer asked you, 'Whose idea was this to rob the market?" And you said, 'It was Jesse's'? A. Yes, sir. Q. He asked you, 'Did Jesse lay out the plans?' You said, 'Yeah.' 'To knock over the market?' And you said, 'Yeah'? A. Yes. Q. Then he asked you, 'Was Jesse Bosby or Gilbert Cooper to go in the market first or this white fellow known as Glen Harrington'? A. Yes, sir. Q. And you said, 'To

try and cash a check'? A. Yes, sir. Q. Is that right? A. Right. Q. *Was that the agreement? A. That's the way it was supposed to go, yes, sir. . . . Q. Is that the way you were going to do it that day? A. It wasn't decided whether we'd do it that day or not. . . . Q. Isn't that what happened that day? A. That's what happened, yes, sir.*" (Emphasis added.)

We, therefore, dispose of this aspect of the appeals of Rhone, Bosby and Cooper in the following apposite paraphrase of the holding in *People* v. *Charles*, *supra*, 66 A.C. 325, 333-334: "Turning first to the basic *Aranda* violation, we consider crucial the fact that each defendant's case was completely shattered by his own detailed confession, corroborated by the eyewitness testimony of [the independent witnesses and] the robbery victim[s]. In this setting, the fact that each defendant was also implicated by his codefendant[s'] confession cannot realistically have contributed to [his own] conviction. . . . [W]e find no reasonable probability in this case that [the] jury would have returned a more favorable verdict for [appellants] if, as required by *Aranda*, the defendants had been tried separately or each confession had been 'edited' to include no references damaging to the nondeclarant[s]."[3]

Although it is true that appellant Harrington did not make a confession, nevertheless he did admit that he was the red-haired man who had entered the store with his three negro companions; that he had fled with them after the murder; and that thereafter he had dyed his hair black and shaved off his moustache. Inasmuch as the vic-

[3] In this regard it is rather ironic to note that with remarkable prescience and with the careful attention he gave to appellants' rights throughout the trial, the trial court in the instant case initially actually had required the statements to be edited prior to being presented to the jury. For his pains he was accused by one defense counsel of increasing the prejudicial effect of the statements because it was then impossible for the jury to hear which party had done what, and therefore they might conclude that his client had done more than he actually had. The court therefore reversed itself and permitted the statements to be introduced as given in order to be fair to appellants!

tims of the robbery had testified that Harrington had drawn a gun, ordered Ashcraft to "Hold it," and that they were moving to the rear of the establishment as directed when Mr. Serna was killed, it is virtually inconceivable that any jury could have escaped the conclusion that Harrington was engaged in an attempted robbery and was answerable for the murder committed by his co-conspirator in the course thereof.

Appellants' final contention based upon alleged error in instructing the jury is unmeritorious for two reasons. First, it was perfectly and unmistakably clear from the moment that the prosecution made its opening statement to the jury, until it closed its final argument, that the instant case was being tried upon the theory of the felony-murder doctrine. No indication was ever given at any time that the prosecution was contending that Mr. Serna's death had been specifically deliberated and premeditated in the ordinary usage of these terms. In addition, the court did not give any instruction concerning premeditation in first degree murder. (Cf. CALJIC 303.) The sole basis for appellants' argument on this issue arises from the apparently inadvertent failure of the trial court to completely strike that portion of CALJIC 302-A[4] that refers to premeditated killings. As given, the instruction was only partially deleted as follows: "All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 of the Penal Code, is murder of the first degree, and all other kinds of murder are of the second degree."

Inasmuch as the court did not instruct on premeditation but did give complete instructions on murder in the commission of certain felonies (CALJIC 302-F), murder of the second degree (CALJIC 305), and voluntary manslaughter (CALJIC 308-A, 310, 311, 311-A, 305-AA), we conclude that the jury was not confused as to the issues

[4] CALJIC 302-A is a verbatim quote of Penal Code, section 189.

submitted for their determination. As presented to them by the prosecution, each defense counsel and by the court, the degree of the murder was to be determined solely upon the basis of the felony-murder doctrine.

However, in disposing of this assignment of error on this basis, we do not imply that appellants are correct in their basic contention that the evidence would be insufficient to warrant giving an instruction on premeditated murder quite apart from the felony-murder doctrine. As observed by the Supreme Court in *People* v. *Washington*, 62 Cal.2d 777, 781-782:

"A defendant need not do the killing himself, however, to be guilty of murder. He may be vicariously responsible under the rules defining principals and criminal conspiracies. All persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design. [Citations.] Moreover, when the defendant intends to kill or intentionally commits acts that are likely to kill with a conscious disregard for life, he is guilty of murder even though he uses another person to accomplish his objective. [Citations.]

"Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill. Under such circumstances, 'the defendant for a base, antisocial motive, and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death' [citation], and it is unnecessary to imply malice by invoking the felony-murder doctrine. To invoke the felony-murder doctrine to imply malice in such a case is unnecessary and overlooks the principles of criminal liability that should govern the responsibility of one person for a killing committed by another. [Citations.]"

When four men arm themselves with deadly weapons and enter a public market for the purpose of robbing it, or even "to case it" as appellant Rhone asserted, it seems clear that "for a base, antisocial motive and with wanton disregard for human life, [they commit] an act that involves a high degree of probability that it will result in

death." (*People* v. *Washington*, *supra*, 62 Cal.2d at p. 782.)

The judgments are affirmed.

HERNDON,
J.

We concur:

ROTH,
P.J.
FLEMING,
J.

THE COURT: This opinion is not for publication pursuant to the provisions of Rule 976, California Rules of Court.

CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the preceding is a true copy of the opinion held in the cause.

, as shown by the record of my office.

CLAY ROBBINS, JR.
Clerk
By /s/ G. L. Villannen
Deputy

[SEAL]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

2nd Crim. No. 11579

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

vs.

JESSE BOSBY, GILBERT COOPER, GLEN MARTIN HARRINGTON and GEORGE RHONE, JR., DEFENDANTS AND APPELLANTS

ORDER FOR PUBLICATION

THE COURT:

IT IS ORDERED that the order certifying the opinion in this case, filed November 21, 1967, for non-publication is vacated, and it is ordered that said opinion is suitable for publication.

DATED: November 28, 1967.

CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the preceding is a true and correct copy of an order of this Court as shown by the records of my office.

Witness my hand and the seal of this Court this 3rd day of December A.D., 1968.

CLAY ROBBINS, JR.
Clerk
By /s/ G. L. Villannen
Deputy Clerk

[SEAL]

/s/ HERNDON, J.

ORDER DUE
January 19, 1968

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, Crim. No. 11579

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

Filed, Jan. 17, 1968, William I. Sullivan, Clerk.

PEOPLE

v.

BOSBY ET AL.

Petition of Jesse Bosby, George Rhone, Jr., and Glen Martin Harrington (Appellants) for hearing DENIED.

TRAYNOR
Chief Justice

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 3rd day of December A.D. 1968.

WILLIAM I. SULLIVAN
By /s/ R. Johnson
Deputy Clerk

[SEAL]

SUPREME COURT OF THE UNITED STATES

No. 231 Misc., October Term, 1968

GLENN MARTIN HARRINGTON, PETITIONER

v.

CALIFORNIA

On petition for writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

On Consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 750 and placed on the summary calendar.

November 18, 1968

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No. 750

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1957

No. 1860 MISC.

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF CALIFORNIA,
SECOND DISTRICT, DIVISION 2
(First Degree Murder)

ROGER S. HARRON
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Attorney for Petitioner,
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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

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APPENDIX "A"

OPINION OF CALIFORNIA COURT OF APPEALS, SECOND DISTRICT, DIVISION TWO, 256 A. C. A. 555

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. _____

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF CALIFORNIA,
SECOND DISTRICT, DIVISION 2
(First Degree Murder)

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Glenn Martin Harrington prays

that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of California, Second District, Division Two, entered in the above entitled case on November 21, 1967. Petition for a hearing of the above entitled case was made to the Supreme Court of the State of California and a hearing was denied on January 17, 1968. Under the law of California, this petitioner's judgment became final 30 days after January 17, 1968, to wit: February 16, 1968, and he has exhausted all remedies at the State level.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals of the State of California, Second District, Division Two, entered in this case on November 21, 1967, is printed in Appendix A hereto; said opinion is entitled:

THE PEOPLE, Plaintiff and Respondent, vs. Jesse Bosby, et al., Defendants and Appellants, 256 Adv. Cal. Appellate Reports 555, rendered by the Honorable Roy Herndon, Justice, and concurred in by the Honorable Lester Wm. Roth, presiding Justice, and the Honorable Macklin Fleming, Justice.

JURISDICTION

The judgment of the Court of Appeals of the State of California was entered on November 21, 1967. A petition for hearing in the

California Supreme Court was denied January 17, 1968. Under California law, the judgment became final February 16, 1968. The jurisdiction of this Honorable Court is invoked under Title 28, U.S.C.A., Section 1257.

QUESTIONS PRESENTED

The principal questions involved herein are the following:

1. Does the joint trial of codefendants in a criminal proceeding before a jury composed of lay citizens where confessions of codefendants implicating this petitioner are introduced in evidence and where said codefendants do not take the witness stand for cross examination purposes violate the confrontation clause of the 6th Amendment and the due process clause of the 14th Amendment to the United States Constitution?

2. Does the process of instructing that lay jury that they are to consider the confessions only as evidence against the confessor and not as evidence against the implicated party sufficiently guarantee due process of law under the 14th Amendment to the party implicated in view of this Honorable Court's ruling in Jackson v. Denno (1964), 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774?

3. Is the doctrine of Delli Paoli v. United States (1957), 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 still valid law in view of the combined effect of the decisions of this Honorable

Court in Jackson v. Denno (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S. Ct. 1774, Turner v. Louisiana (1965), 379 U.S. 466, 13 L.Ed.2d 424, 85 S. Ct. 546, Pointer v. Texas (1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S. Ct. 1065, Douglas v. Alabama (1965), 380 U.S. 415, 13 L.Ed.2d 934, 85 S. Ct. 1074 and Brookhart v. Janis (1966), 384 U.S. 1, 16 L.Ed.2d 314, 86 S. Ct. 1245?

4. Does not the combined effects of the above cited cases in question 3, interpreting the 6th and 14th Amendments, require, as a protection of a specific constitutional right, that procedures as set forth by the Supreme Court of the State of California in People v. Aranda, et al. (1965), 63 Cal.2d 518 be now regarded as the law of the land?

5. Because this violation of this specific constitutional right involves the violation of a right protected by the United States Constitution, is not a reviewing Court required to apply a harmless error test at least as strict as that announced in Chapman v. California (1967), 386 U.S. 18, 23, 17 L.Ed.2d 705, 87 S. Ct. 824, viz: "the prosecution must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained?"

6. Does not the denial of a motion to sever the moving party's trial from that of his co-defendant amount to a denial of due process of law whenever said joint trial will require the jury to determine both the voluntary nature and truth of an extrajudicial statement which incriminates

both the maker and his codefendant?

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

1. 6th Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an important jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

2. 14th Amendment

Section 1

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SUMMARY STATEMENT OF THE INSTANT CASE

Petitioner Glenn M. Harrington, along with codefendants Jesse Bosby, George Rhone and Gilbert Cooper, were charged with attempted robbery and first degree murder in the alleged attempt to rob a grocery store and market in Los Angeles.

All were brought to trial jointly in the Superior Court of the State of California for the County of Los Angeles before the Honorable Joseph Wapner.

Petitioner Harrington is a Caucasian, and the other three codefendants are Negroes. Although petitioner Harrington was allegedly identified as being at the scene of the crime, the proprietor of the store testified that she told police that "all four defendants were Negro" and other evidence tended to undermine the identification made of petitioner Harrington as an active participant in the robbery and murder.

In pre-trial incustodial interrogation, extensive confessions were obtained from all three codefendants, implicating Glenn M. Harrington. All three confessions were read before the jury. Two of them consisted of documents over 30 pages in length. Harrington made no confession and plead not guilty. Defendant Rhone did take the stand for cross-examination, but the other two codefendants did not. "Appropriate" limiting instructions to consider each of these extensive confessions only against the confessor were

read to the jury.

It is thus evident that three major, repeated, machine-gun-like, impacting confessions implicating petitioner Harrington were read to the jury; that these three codefendants served as witnesses against Harrington cannot be seriously doubted unless one indulges in the fiction that the lay jury could effectively compartmentalize its mind to give no credence to the repeated implications of Harrington by the other defendants. Harrington was denied the opportunity to cross-examine defendants Cooper and Bosby at all for the reason they chose to invoke their constitutional rights not to be witnesses against themselves.

All four defendants were convicted of first degree murder; said convictions were affirmed by the California State Court of Appeals, 256 A. C. A. 555, despite the court's acknowledgment of the violation of the California "Aranda Rule", People v. Aranda, 63 Cal. 2d 518. The Supreme Court of California denied a Petition for Hearing on January 17, 1968, and its Order became final 30 days later, February 16, 1968.

Petitioner Harrington via his trial counsel made numerous and repeated motions to have his trial severed from the other three codefendants. In a pre-trial motion, said request was denied. After assignment to the trial court, the trial transcript on the following pages indicates the extensive efforts expended by counsel:

Page 3-A, line 10 through page 18-A,

line 3;

Page 11, line 9 through page 20, line 7.

It is to be noted that counsel for Harrington ably and repeatedly cited the United States v. Delli Paoli and Jackson v. Denno decisions as authority for his argument to sever the trials. At all times, the motions were denied by the trial court.

The trial court, acutely aware of the problem, joined in extensive efforts to "edit" each one of the confessions. After numerous attempts, petitioner's counsel complained that, after the extensive editing job to blank out the names of codefendants, the jury would no longer be able to ascertain the extent to which each defendant participated. Because of this, the trial court abandoned effort to delete names and inculpatory phraseology and allowed each lengthy confession to be read in its entirety. In the trial transcript at page 268, line 10 begins the extensive effort of the trial court to edit the confession of defendant Gilbert Cooper. The procedure occupied some 36 pages of effort of the trial court in the transcript.

On page 353 of the trial transcript, the court began supervising the editing job of the confession of George Rhone. Petitioner Harrington's counsel, at page 334, lines 9 and 15, entered timely objections to the deletion process, as it replaced the concrete names with ambiguous phrases such as "this other man"; the name of codefendant Cooper was here changed to "this

other man", and petitioner's attorney felt the jury might speculate that "this other man" might be Harrington. Numerous other objections to the process were entered by respective counsel.

In finality, the trial judge felt that petitioner's counsel was accusing him of making the situation worse for petitioner after the deletions than before, and allowed (see pages 364-377 trial transcript) all incriminating confessions into evidence totally unedited. In this way, with the three Negroes making confessions each implicating each other and petitioner Harrington, there is little doubt that the lay jury had no difficulty in concluding that all three codefendants before the court were involved, and each implicated petitioner by their confession.

Interestingly, the police officer who was to read the edited, greatly altered statements to the jury voiced his own objections to the trial judge (pages 364-369, Trial Transcript). As altered, no names at all appeared, and the officer felt the jury would believe him an incompetent police investigator because he had failed to ascertain the names of the parties involved!

In finality, then, for the purposes of this petition, petitioner Glenn Martin Harrington was tried with three codefendants, all of whom made confessions implicating Harrington. Editing of said confessions was attempted by the trial judge and all counsel, but was abandoned when the result became ridiculous. All three unedited confessions implicating petitioner were read to the twelve men lay jury with "appropriate"

instructions to consider each only against the confessor. Two of the three codefendants failed to take the stand for cross-examination purposes. Petitioner contends each codefendant was a witness who testified against petitioner without confrontation because of the inability of a lay jury to distinguish and compartmentalize the facts in their minds, restricting it only to the confessor.

Upon the authority of Jackson v. Denno (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S. Ct. 1774, Pointer v. Texas (1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S. Ct. 1065, Douglas v. Alabama (1965), 380 U.S. 415, 13 L.Ed.2d 934, 85 S. Ct. 1074 and Brookhart v. Janis (1966), 384 U.S. 1, 16 L.Ed.2d 314, 86 S. Ct. 1245, petitioner contends he has been denied the right to confront all the witnesses testifying against him, and has therefore been denied Due Process of Law under the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner contends Delli Paoli v. United States has been vitiated and nullified by the above authority, and humbly and respectfully petitions this Honorable Court for a Writ of Certiorari to reconsider this decision of some ten years ago, which has tantamountly been overruled by subsequent authority.

REASONS FOR GRANTING THE WRIT

I

THE LAW OF THE CASE UNITED STATES v. DELLI PAOLI (1957), 352 U.S. 232, IS THEORETICALLY STILL VALID LAW. IN PRACTICALITY, THIS HONORABLE COURT HAS VITIATED SAID CASE BY THE COMBINED EFFECTS OF JACKSON v. DENNO, POINTER v. TEXAS, DOUGLAS v. ALABAMA, AND BROOKHART v. JANIS. BECAUSE OF THIS, IT SHOULD FOLLOW THAT THIS HONORABLE COURT SHOULD GRANT A WRIT OF CERTIORARI TO RECONSIDER THE FULL SIGNIFICANCE OF DELLI PAOLI IN LIGHT OF INTERVENING DECISIONS PROMULGATED DURING THE LAST DECADE.

In 1957, the Supreme Court of the United States in a 5-4 vote decided the case of United States of America v. Orlando Delli Paoli, 352 U.S. 232, 1 L.Ed.2d 278, 77 S.Ct. 294.

As is well familiar to this Honorable Court, the major issue decided permitted the practice of the United States Federal Courts to try two or more codefendants in one trial, and introduce the confessions of any codefendants which

implicated the other defendant or defendants, if proper instructions were read to the jury asserting that said jurors were to consider the confessions only against the maker and in no way dispositive of the merits of the case of the parties codefendant whom might be implicated by the confessor.

As is noted, some excess of ten years have elapsed since the United States v. Delli Paoli decision. Supporting the majority vote were the Honorable Earl Warren, Chief Justice of the United States, and the Honorable Associate Justices Harold H. Burton, Stanley F. Reed, John Marshall Harlan and Tom C. Clark.

Supporting the dissent were the Honorable Associate Justices Felix Frankfurter, William O. Douglas, Hugo L. Black, and William J. Brennan.

In the interim since 1957, numerous decisions of this Honorable Court have been promulgated which this petitioner respectfully asserts have eroded and nullified the Delli Paoli doctrine. Among these, but certainly not exhaustive are:

1. Jackson v. Denno (1964), 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774;

2. Bob Granville Pointer v. State of Texas (1965), 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065;

3. Jesse Elliott Douglas v. State of Alabama (1965), 380 U.S. 415, 13 L. Ed. 2d 934,

85 S. Ct. 1074;

4. James Brookhart v. Martin A. Janis, April 18, 1966, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245.

In addition, several notable decisions of the various Circuit Court of Appeals have interpreted United States v. Delli Paoli in light of Pointer v. Texas and Douglas v. Alabama.

These will be developed within this petition infra.

And finally it is noted that enlightened State Supreme Courts have given considerable attention to this major constitutional issue, some of them promulgating rules of their own to aid in the promotion of fairness in criminal procedures within their own states.

Notable among the latter category is the Supreme Court of the State of California, with its "Aranda Rule", enunciated by Chief Justice Roger J. Traynor, writing for the majority in People of the State of California v. John Mark Aranda, et al (1965), 63 Cal. 2d 518, decided November 12, 1965.

The Supreme Court of California has given retroactive application to the Aranda Doctrine to all cases not having become final on the date of its decision, November 12, 1965, as enunciated in People of the State of California v. John Charles, Jr. and Oliver M. Boddie (1967), 66 Cal. 2d 330.

This petitioner, Glenn Martin Harrington, hereby petitions this Honorable Court to grant him a Writ of Certiorari directed to a review of the constitutionality of the rule of United States v. Delli Paoli in light of the major decisions of Pointer v. Texas, Douglas v. Alabama, and Brookhart v. Janis involving and interpreting the mandates of the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner Harrington hereby asserts that the following procedure, now permitted under United States v. Delli Paoli taken alone, violates the Sixth and Fourteenth Amendments to the Constitution of the United States:

Should any court in a criminal matter try in a jury trial two or more defendants in a single trial and introduce into evidence a confession or admission of one of the codefendants which implicates a non-confessing codefendant as a principal or accessory in the crime, without that confessing and implicating codefendant taking the witness stand for the purposes of cross-examination, the non-confessing codefendant which is thereby implicated has been denied the Right of Confrontation of all witnesses who have testified against him; hence he has had the rights guaranteed to him under the Sixth and Fourteenth Amendments to the Constitution of the United States violated; instructions to the jury to disregard the confession as to the implicated party notwithstanding.

Petitioner Harrington asserts that a limiting instruction to a lay jury to consider the

confession only against the confessor, and not in any way dispositive of the case of the defendant who has not confessed, and has thereby been implicated, is inadequate to protect the constitutional rights of the defendant implicated. In the year 1957 in the Delli Paoli case, Assocate Justices Frankfurter, Douglas, Black and Brennan agreed with this assertion.

In 1964 in the case of Jackson v. Denno, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774, this Honorable Court agreed with this asserted inability of a lay jury to effectively compartmentalize their minds to evaluate the effects of illegally obtained or involuntary confessions, when, after hearing the confession and voting it involuntary, to thereafter disregard it.

The voting on this issue was 5-4, with the majority being composed of Chief Justice Warren, Associate Justices White, Douglas, Brennan and Goldberg. Four of the majority occupy seats on the current Court.

The Supreme Court of the State of California has declared that it has no faith in said limiting instructions. California Chief Justice Roger J. Traynor speaking in People v. Aranda (1965), 63 Cal. 2d 518, at 526 stated:

> "Whether or not these criticisms of the present rule require its abrogation, a question we consider later herein, they clearly foreclose any assumption that error in admitting a confession that implicates both defendants is rendered

harmless to the non-confessing defendant by an instruction that it should not be considered against him."

The California Supreme Court has consistently thereafter adhered to that enunciation. For example, in People v. John Charles, Jr., et al. (1967), 66 Cal.2d 330, 343, through Justice Mathew O. Tobriner, it has stated:

> "The trial court was careful to state in this case that Boddie's confession would not be considered against Charles, but in Aranda (63 Cal.2d 518, 526) we emphatically rejected 'any assumption that error in admitting a confession that implicates both defendants is rendered harmless to the non-confessing defendant by an instruction that it should not be considered against him.' "

It is, in passing, worthy of note that numerous learned United States Supreme Court Justices Circuit Courts of Appeals Justices and United States District Court Trial Judges have colorfully described the inability of a lay juror to totally disregard that which he at one time was to diligently scrutinize for another purpose. Among these are:

1. Honorable John M. Harlan, dissenting in Jackson v. Denno, 378 U.S. 368, 434:

> "But was there not greater danger in Delli Paoli that one defendant's confession of his and his codefendant's guilt

would infect the jury's deliberations bearing on the guilt of the codefendants?"

2. The New York Court of Appeals Justice Lehman dissenting in People v. Fisher, 249 N. Y. 419, 428, 164 N. E. 336, 339:

"... the procedure results in serious impairment of the rights of the accused to a fair consideration by an impartial jury of the competent evidence produced against him."

3. Justice Frank of the 2nd Circuit, dissenting in Delli Paoli v. United States, 229 F. 2d 319, 322:

"It is a 'fiction' and a 'naive assumption' about the ways juries can function."

4. In Nash v. United States (2nd Cir.), 54 F. 2d 1006, 1007:

The rule calls upon the jury to perform "a mental gymnastic which is beyond, not only their powers, but anybody's else."

5. The Honorable Felix Frankfurter dissenting in Delli Paoli v. United States, 352 U. S. 232:

"The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such non-admissible

declaration can not be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. . . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they can not put out of their minds."

6. Judge Frank in United States v. Antonelli Fireworks Co. (2nd Cir. 1946), 155 F.2d 631, 656:

"... the task was like that of "the boy told to stand in the corner and not think of a white elephant."

It is to be noted as well that the Supreme Court of California in deciding its original Aranda Rule, apparently applied it to a jury trial only. Perhaps then with great soul searching, and with perhaps an admission of inability of its own learned trial judges in the Superior Courts of its 58 Counties to disregard the implicating confession as to the non-confessor, the California Supreme Court again through the majority opinion of the learned Justice Tobriner decided the two cases of People of the State of California v. John Charles, Jr. and Oliver Martin Boddie (1967), 66 Cal.2d 330, and People of the State of California v. Robert Lee

Massie and John Robert Vetter, June 21, 1967, 66 Cal. 2d 899.

In overturning the conviction for first degree murder of John Robert Vetter, Justice Tobriner stated at 916 of 66 Cal. 2d 899:

> "Older cases had held almost unanimously that a court could never abuse its discretion in denying a motion for a separate trial because the jury could be admonished not to consider prejudicial testimony admissible only against a codefendant. The more recent cases, however, recognizing the impossibility of a juror's obliteration from his mind of that which he already knew, have held that the court should separate the trials of codefendants in the face of an incriminating confession, ..."

In People v. Massie and Vetter, the Superior Court of Los Angeles County tried together before Judge H. Burton Noble of Pasadena Robert L. Massie and John R. Vetter, no jury. Robert Massie confessed his crime of robbery and first degree murder of one Mildred Weiss, implicating John Vetter as the driver of the getaway car used in the crime. Robert Massie did not take the stand for cross-examination after his confession was played via tape recorder and testified to by police witnesses from the stand to the Honorable H. Burton Noble, Judge. John Vetter emphatically denied his guilt from the stand. Both were convicted of first degree murder. Subsequently, Robert Massie made

extrajudicial statements exonerating John Vetter as the driver of the get-away car.

On June 21, 1967 the Supreme Court of California reversed Vetter's conviction under the Aranda Rule, People v. Aranda (1965), 63 Cal. 2d 518, per Justice Tobriner, at 66 Cal. 2d 899.

On November 4, 1967, by jury trial, John Vetter was acquitted in Los Angeles County Superior Court of First Degree Murder, in an ordered retrial.

Realistically, the California Supreme Court has recognized that experienced trial judges in its own Superior Courts experience difficulty in disregarding an implicating confession as to its affect on the implicated codefendant.

It is to be noted that dissenting Associate Justices Louis Burke, Stanley Mosk, and Marshall McComb of the California Supreme Court recognized this problem, but kept the faith that the trial level judges could generate the required discernment; at 924 of 66 Cal. 2d 899, People v. Massie and Vetter, Associate Justice Burke states:

"This was a non-jury case tried by an experienced trial judge who presumably (emphasis mine) was able to exclude from his consideration in determining Vetter's guilt evidence admitted solely against Massie (Massie's confession implicating Vetter) and to determine

> Vetter's guilt on the basis of the evidence rather than suspicions arising from Vetter's association with Massie. Although at a separate trial Vetter might have obtained exonerating testimony of Massie (Vetter did; California Governor Ronald Reagan stayed Massie's scheduled execution in San Quentin's gas chamber so he could be a witness at Vetter's retrial, and Massie exonerated Vetter) it is likewise possible that Vetter would not have called Massie as a witness or that Massie, if called, would not have given exonerating testimony. Even had Massie been called and given such testimony he could have been impeached by his extrajudicial statements accusing Vetter of being the driver of the get-away car. In my opinion it is not reasonably proper that a result more favorable to Vetter would have been reached in the absence of the asserted errors, and I would affirm the judgments as to Vetter as well as to Massie."

It is hereby submitted that the above case is exemplary authority for the constitutional violation of the confrontation clause of the Sixth Amendment and its prejudicial result; trying Vetter with Massie, introducing into evidence Massie's implicating confession of Vetter (with agreement by the trial judge that he was going to consider the confession only against Massie) and Massie not taking the witness stand for cross-examination purposes was as surely a

violation of the Sixth Amendment's confrontation clause as if Massie would have taken the stand and the Court had refused cross-examination. The California Supreme Court recognized the inability of the trial judge to restrict his thinking.

In the recent case of James Brookhart, Petitioner, v. Martin A. Janis, Director of Ohio Department of Hygiene and Correction, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245, decided April 18, 1966, this Honorable Court reversed the conviction of petitioner Brookhart, citing with continuing approval Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065. At page 316 of 16 L. Ed. 2d 314, the Honorable Justice Hugo L. Black of this Honorable Court stated for eight members of the Court:

"In this court respondent admits that:

"'If there was here a denial of cross examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'

"This concession is properly made. The Sixth Amendment provides that: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .' And in Pointer v. Texas, 380 U.S. 400, 406, 13 L ed 2d 923, 927, 85 S. Ct. 1065, we held that the confrontation guarantee of the Sixth

Amendment including the right of cross examination 'is to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. Malloy v. Hogan, supra, 378 U.S., at 10 [12 L ed 2d at 661].' See also Douglas vs. Alabama, 380 U.S. 415, 13 L ed 2d 934, 85 S. Ct. 1074. It follows that unless petitioner did actually waive his right to be confronted with and to cross examine these witnesses, his federally guaranteed constitutional rights have been denied in two ways.

"In the first place he was denied the right to cross examine at all any witnesses who testified against him. In the second place there was introduced as evidence against him an alleged confession, made out of court by one of his codefendants, Mitchell, who did not testify in Court, and petitioner was therefore denied any opportunity whatever to confront and cross examine the witness who made this very damaging statement."

It is apparent that this was a Judge Trial, as opposed to a Jury Trial. It is submitted therefore, that this Honorable Court was not predisposed to overlook this grave Constitutional error by the rationalization that it happened before a Judge, who could sift the error from

his thinking in arriving at a decision in the case. This grave lack of confrontation of the confession maker and codefendant who did not take the witness stand for confrontation and cross examination by petitioner Brookhart was a "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." 16 L. Ed. 2d 314, 316-317, 384 U.S. 1, 86 S. Ct. 1245.

It is clear this Honorable Court did not even examine as to the application of a Federal Harmless Error Rule, as the violation was direct and clear and cut to the heart of the Sixth and Fourteenth Amendments.

It seems clear, and is hereby asserted by this petitioner that recognizing the inability of a trial judge to disregard the hearsay implicating confession of the codefendant as to defendant Brookhart by this Honorable Court, so much easier should it be to recognize the inability of a lay jury to truly disregard it, even under the command of jury instructions; that whether a judge or jury be the trier of fact, introducing an implicating confession by a codefendant without that codefendant taking the stand for cross-examination purposes is surely a violation of the Sixth Amendments confrontation clause; that said violation requires reversal of the resulting conviction without recourse to a "Harmless Error Rule", and that this Honorable Court in Jackson v. Denno (1964), 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774, 1 A. L. R. 3d 1205, condemned the analogous practice of permitting the jury to hear the substance of a confession,

with instructions to disregard it if the jury found it to be involuntary.

This Honorable Court's attention is directed to the fact that in Jackson v. Denno, supra, the Honorable Chief Justice Warren, a sole-surviving member of this Honorable Court as now constituted among the five-man majority in Delli Paoli, joined the majority in Jackson v. Denno in citing with approval the dissenting opinion of the late Justice Felix Frankfurter in Delli Paoli:

> "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they can not put out of their minds."

It is to be further recalled that among the four dissenters in Delli Paoli, only the late Justice Felix Frankfurter has departed; the Honorable Associate Justices Black, Douglas and Brennan remain with this Honorable Court.

Hearkening back to the considerations wrought by time and further social, scientific, and legal progress which this Court must have given to its decision in granting of certiorari to indigent Clarence Earl Gideon to reconsider Betts v. Brady (1942), 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252, resulting in Gideon v. Wainwright (1963), 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792; to a grant of Certiorari to reconsider Crooker v. California (1958), 357

U.S. 433, 2 L. Ed. 2d 1448, 78 S. Ct. 1287, resulting in Escobedo v. Illinois (1964), 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 and Miranda v. Arizona (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602; to the half-century it took to reconsider Plessy v. Ferguson (1896), 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138, in Brown v. Board of Education (1955), 349 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, this petitioner Glenn Martin Harrington herewith asserts by and through his counsel, Roger S. Hanson of Los Angeles, California, that without formally doing so, this Honorable Court has correctly eroded the 1957 authority of Delli Paoli v. United States (1957), 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 and said decision now lacks vitality.

While recognizing the non-formal reversal of Delli Paoli v. United States (1957), 352 U.S. 232, and its still apparent validity to those states who wish to invoke it, Associate Justice Mathew O. Tobriner of the Supreme Court of California, writing for the majority in People v. Massie and Vetter (1967), 66 Cal. 2d 899, 922 states:

> "If the practice of admitting the extrajudicial implicating confession of a codefendant with limiting instructions were held to be a violation of due process, or of the confrontation clause of the Sixth Amendment, we would, of course, be bound to apply an error test at least as strict as that announced in Chapman v. California (1967), 386 U.S.

18, 23 [17 L. Ed. 2d 705, 87 S. Ct. 824]: '[the prosecution must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'

"Commentators have pointed out that developments in constitutional law since 1957 provide every reason to believe that the decision announced by Justice Burton in Delli Paoli v. United States (1957) 352 U. S. 232 [1 L. Ed. 2d 278, 77 S. Ct. 294] (joined by Justices Reed, Harlan, and Clark, and Chief Justice Warren), approving the practice condemned by Aranda, no longer possesses vitality. They suggest that if confronted with the problem today, the court would hold that a procedure similar to that required by Aranda is compelled by the federal Constitution.

"First, in Jackson v. Denno (1964) 378 U. S. 368 [12 L. Ed. 2d 908, 84 S. Ct. 1774, 1 A. L. R. 2d 1205], the Supreme Court condemned the analogous practice of permitting the jury to hear the substance of a confession, with instructions to disregard it if the jury found it to be involuntary. Chief Justice Warren, a member of the five-man majority in Delli Paoli, joined the majority in citing with approval the dissenting opinion of Justice Frankfurter in Delli Paoli: 'The Government should not have the windfall of having the jury be influenced

by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' (Id. at 388 fn. 15.)

"Second, in Pointer v. Texas (1965) 380 U.S. 400 [13 L.Ed.2d 923, 85 S.Ct. 1065], and Douglas v. Alabama (1965) 380 U.S. 415 [13 L.Ed.2d 934, 85 S.Ct. 1074], the court held applicable to the states the Sixth Amendment's guarantee protecting an accused's right to confront the witnesses against him. In Douglas, the prosecutor was permitted to cross-examine an accomplice by reading his extrajudicial implicating confession, over the accomplice's refusal to answer incriminating questions; despite the trial court's instruction that the jury consider as evidence of guilt only the testimony of witnesses (380 U.S. 415, Transcript of Record, pp. 11-16, instructions 39, 42, 69, 71), the Supreme Court reversed the conviction, thereby implying necessarily that the instructions were insufficient to cure the prejudicial effect of the accomplice confession.

"Third, Spencer v. Texas (1967) 385 U.S. 554 [17 L.Ed.2d 606, 87 S.Ct. 648], when viewed together with Pointer and Douglas, provides additional support for the belief that the Delli Paoli procedure is unconstitutional. In Spencer, the court, through Justice Harlan, upheld the constitutionality of the Texas recidivist

statute, whereby the jury is informed of a defendant's prior convictions for sentencing purposes and instructed to ignore them in finding guilt or innocence. Although his opinion refers to Delli Paoli in discussing generally the permissibility of joint trials, Justice Harlan does not mention Delli Paoli's approval of admitting implicating confessions. Moreover, the opinion distinguishes Jackson v. Denno on the ground that 'the emphasis there was on protection of a specific constitutional right.' Since Pointer and Douglas identified the confrontation clause as the source of 'a specific constitutional right' applicable to the states, the Delli Paoli procedure should share the fate of the procedure condemned in Jackson v. Denno.

"In his dissent in Jackson v. Denno, Justice Harlan asked, 'But was there not greater danger in Delli Paoli that one defendant's confession of his and his codefendant's guilt would infect the jury's deliberations bearing on the guilt of the codefendants?' (378 U.S. at 434.) The similarity between the policies of insulating the jury from the confessions of a defendant before they are determined to be voluntary, and insulating the jury from the implicating portions of the confessions of codefendants was also recognized in The Supreme Court, 1963 Term (1964) 78 Harv. L. Rev. 143, 213:

'Because of these close parallels between Jackson and Delli Paoli, Jackson may foreshadow a holding that the Delli Paoli procedure violates due process.'

"See also People v. Aranda, supra, 63 Cal. 2d 518, 529 fns. 7 and 8; People v. Clark (1965) 62 Cal. 2d 870, 885 fn. 13 [44 Cal. Rptr. 784, 402 P. 2d 856]."

In a sense it should be recognized that the prejudicial effect of Delli Paoli is more caustic than the prejudicial effect of Jackson v. Denno error. This is because in Jackson v. Denno, the confession, if ruled invalid by the jury was physically removed thereafter from the trial; only its lingering mental recall lurked to introduce error. Clearly in Delli Paoli error, the confession of the co-defendant, while under jury rules to be disregarded as to the non-confessing defendant, still physically remains intact as to the confessor. This means the jury may ask to have it replayed to refresh its mind on the evidence; in some states if it is transcribed to a typewritten form and signed and introduced into evidence, it may be carried into the jury deliberation room to read and re-read. In this respect, it makes recurring impact on the jury's minds and further vitiates the fiction that a jury can isolate its effect only to the confessor as required by the quickly-read and seldom truly understood jury instructions. The Delli Paoli error is therefore truly always a part of the entire case, and cannot be as theoretically

rectified as was the Jackson-Denno error.

In People v. Aranda (1965) 63 Cal. 2d 518, 529, the Chief Justice of California, the Honorable Roger J. Traynor has stated the problem lucidly:

> "Indeed, the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which Jackson held violated due process, the jury was only required to disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In joint trials, however when the admissible confession of one defendant inculpates another defendant the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering innocence of the declarant and then of ignoring it in determining the guilt of innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes' (People v. Chambers, 231 Cal. App. 2d 23, 33, 41 Cal. Rptr. 551). It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."

In People v. Massie and Vetter, 66 Cal. 2d 899, 923, Justice Tobriner of California's Supreme Court states:

> "In the present case, in view of the closely balanced state of the evidence, it is reasonably probable that Vetter would have received a more favorable verdict at a separate trial. First, we have recognized that even a judge would face a formidible task in attempting to exclude from his consciousness the certain knowledge that in his confession, inadmissible as to Vetter, Massie had named Vetter as the driver of his get-away car."

Thus, we see that the California Supreme Court has given careful consideration to this problem, and has declared emphatically that in either a judge or jury trial, it feels the requisite mental compartmentalization and segregation can not be attained.

Therefore, in the interests of justice and to insure uniform interpretation of the confrontation clause of the Sixth Amendment to the United States Constitution, now binding on the State Courts of California (Pointer v. Texas, 380 U.S. 400) this Honorable Court is respectfully petitioned to grant Certiorari in the instant case, Glenn Martin Harrington v. State of California; the major issue is the question of the constitutionality of Delli Paoli v. United States. The issue is, said another way, "Should this Court's holding in United States v. Delli Paoli,

352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 be reconsidered?"

This petitioner respectfully submits it should, for it is clearly a constitutional question of national import, evoking the thought-provoking processes of numerous legal scholars at both the trial and appellate levels throughout these United States, over the past decade.

II

THE SUPREME COURT OF THE UNITED STATES SHOULD DECLARE THAT THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE APPLYING THE CALIFORNIA "ARANDA RULE" AS DEVELOPED IN PEOPLE v. ARANDA (1965), 63 Cal. 2d 518 TO JOINT TRIALS OF CODEFENDANTS AND A REVIEW OF THAT AUTHORITY TO COMPARE IT TO DELLI PAOLI v. UNITED STATES, 352 U.S. 232 DEMANDS THE GRANTING OF THIS WRIT OF CERTIORARI.

As enunciated by the Honorable Roger J. Traynor, Chief Justice of California in People v. Aranda, 63 Cal. 2d 518, at 529, 530 and 531, that rule is:

"The grave constitutional doubts

engendered by our present practice of permitting joint trials when the confession of one defendant implicates codefendants has prompted our reconsideration of this practice. Whether or not it is constitutionally permissible, the practice is prejudicial and unfair to the nondeclarant defendant and must be altered. . . . In the absence, however, of a holding by the United States Supreme Court that the due process clause requires such change, the rules we now adopt are to be regarded, not as constitutionally compelled, but as judicially declared rules of practice to implement section 1098 (Cal. Penal Code).

"When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant the trial court must adopt one of the following procedures:

(1) It can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established.

(2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions can not be made.

(3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a co-defendant, the trial court must exclude it if effective deletions are not possible."

It is submitted that grave constitutional questions need reviewing by this Honorable Court in a hearing granted for this sole purpose; the resulting decision should clarify this major problem on the national level, either requiring those states which do not conform to Aranda standards to do so, or further distinguishing the mandates of Pointer v. Texas, Douglas v. Alabama, Brookhart v. Janis and Jackson v. Denno from Delli Paoli v. United States. And, as well, this Court should elucidate the fact that this problem and the resulting error constitute constitutional error of the first magnitude, which can not be saved by a harmless error rule; automatic reversal is required.

III

THE CALIFORNIA COURT OF APPEALS ERRED IN APPLYING ANY HARMLESS ERROR RULE TO THIS VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT, FOR IT WAS A CONSTITUTIONAL ERROR OF THE FIRST MAGNITUDE AND NO AMOUNT OF SHOWING OF WANT OF PREJUDICE WOULD CURE IT.

It is clear that there are errors committed at the trial level such as the introduction into evidence of a coerced confession which automatically require reversal no matter what other supporting evidence is available.

It is further true that violations of federally protected rights require application of the federal harmless error rule. In this regard we have the comment on the failure of the defendant to take the witness stand by a prosecutor, as noted in Griffin v. California, 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229, and as enunciated in Chapman and Teale v. California (1967), 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824, overruling application of the California State harmless error rule to the Griffin v. California type of error.

Lastly, if the error is one of state law or practice, the states may themselves apply their

own harmless error rule.

As noted in the Appendix A in the opinion of the California Court of Appeals, the State harmless error rule was here applied 256 A. C. A. 555, 560. See also California Constitution, Article VI, Sec. 13; People v. Watson (1956), 46 Cal. 2d 818, 836, 299 P. 2d 243.

As noted previously in this petition, Brookhart v. Janis (1966), 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 per the Honorable Justice Hugo Black, makes "a denial of cross examination without waiver a constitutional error of the first magnitude and no amount of showing of want to prejudice would cure it."

It is therefore submitted that Jackson v. Denno requires this Court to reconsider Delli Paoli v. United States, and arrive at the conclusion that the confessing defendant's statements are truly being applied to the party being incriminated. If this is so, and that confessing defendant has not taken the witness stand for cross-examination by the implicated defendant, the Sixth Amendment has been violated, and a reversal of the conviction is required by Brookhart v. Janis regardless of the availability of valid other convicting evidence.

It is therefore evident that the Court of Appeals erred in applying a state harmless error rule to "a constitutional error of the first magnitude [where] no amount of showing of want of prejudice would cure it." 16 L. Ed. 2d 314, 316, 317.

IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING PETITIONER'S TIMELY MOTION FOR A SEPARATE TRIAL, AND THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION REGARDLESS OF THIS ERROR.

In People v. Clark, 62 Cal.2d 870, 885, the Honorable Raymond E. Peters, Associate Justice of the California Supreme Court states:

> "Some authorities in this field feel that a denial of a motion to sever amounts to a denial of due process whenever joint trial will require a jury to determine both the voluntary nature and truth of an extrajudicial statement which incriminates both the maker and his codefendant. The reasoning is that the jury, even though instructed that an extrajudicial statement is not to be considered against any defendant save he who made it, cannot put out of mind its determination of the truth of that statement in all of its details. Hence, it unconsciously accepts the truth of the hearsay.
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> "In Jackson v. Denno, 378 U.S. 368 [84 S.Ct. 1774, 12 L.Ed.2d 908],

the United States Supreme Court held that a jury is ordinarily incapable of separating the issue of voluntariness of an extrajudicial statement from the issue of its truth, and that due process requires that the trial judge determine the first issue. If defendants are to be tried under circumstances wherein their several extrajudicial statements incriminate the others, even more is required of the jury than under the situation involved in Jackson. In such case, the jury is expected to forget that it found the statement containing the hearsay incrimination to be true. As said in People v. Chambers, 231 Cal. App. 2d 23, 33 [41 Cal. Rptr. 551] 'Thoughtful judicial opinions have voiced misgivings as to jurors' ability to segregate evidence into separate intellectual boxes, each containing a single defendant. (People v. Biehler, supra, 198 Cal. App. 2d at p. 298 [17 Cal. Rptr. 862]; see also United States v. Haupt, 136 F. 2d 661, 673-674.) Unconscious motivations . . . slip into the processes of conscious mentation unseen, unfelt and usually unacknowledged. . . . [J]udicial cliches carving jurors' minds into autonomous segments may waver and fail.'

"In Jackson, supra, the court quoted with approval from Morgan, Some Problems of Proof under the Anglo-American System of Litigation

(1956) pages 104-105, where the author says, referring to the issue of voluntariness, ' "regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it. . . . [T]he rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed." ' If this be so, how can that juror be uninfluenced by that portion of the confession which incriminates a codefendant? If he finds the confession to be true, does he find it true only in those matters wherein the codefendant plays no part? Can he find that the confession is true insofar as it admits that A committed certain acts in concert with B, and not at the same time believe that B committed those same acts in concert with A? By finding the confession to be true, has he not convicted the codefendant without benefit of other evidence? The incongruity of any rule which assumes that this dilemma may be cured by instructions is discussed in a comment in 78 Harvard Law Review 211, at page 213. It has been argued that a proper rule would either (1) require severance of trials when such extrajudicial statements are to be used, (2) make such statements inadmissible when the prosecution insists on joint

trial, or (3) allow joint trial and use of extrajudicial statements only after the trial judge has deleted therefrom all reference to any codefendant."

In that same opinion, Justice Peters quotes approvingly People v. Chambers, 231 Cal. App. 2d 23, 33:

> "Thoughtful judicial opinions have voiced misgivings as to jurors ability to segregate evidence into separate intellectual boxes, each containing a single defendant. Unconscious motivations . . . slip into the processes of conscious mentation unseen, unfelt and usually unacknowledged . . . . Judicial cliches carving jurors' minds into autonomous segments may waiver and fail."

Here the petitioner timely voiced his motion for a separate trial to avoid the Delli Paoli error; this motion was denied, and it is error of the first magnitude, requiring granting of the Writ of Certiorari to review again the Delli Paoli rule.

For the reasons hereinabove stated, petitioner Glenn Martin Harrington respectfully prays that the Writ of Certiorari issue to the State of California Court of Appeals, Second District, Division Two to review the judgment of that Court and to reconsider the current validity of Delli Paoli v. United States, 352 U.S. 232.

Respectfully submitted,

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Supreme Courts of California, Michigan, Illinois and Iowa

Attorney for Petitioner,
Glenn M. Harrington

APPENDIX "A"

OPINION OF CALIFORNIA COURT OF APPEALS SECOND DISTRICT, DIVISION TWO 256 A.C.A. 555

APPEALS from judgments of the Superior Court of Los Angeles County. Joseph A. Wapner, Judge. Affirmed.

Prosecutions for murder. Judgments of conviction of first degree murder affirmed.

Patrick J. Sampson, under appointment by the Court of Appeal, and William V. Shannon, Jr., under appointment by the Court of Appeal, for Defendants and Appellants.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and James H. Kline, Deputy Attorney General, for Plaintiff and Respondent.

HERNDON, J. - Each of the defendants Bosby, Cooper, Harrington and Rhone has appealed from the judgment entered upon the verdict of a jury finding him guilt of murder in the first degree. [1] The jury fixed each

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1 At the time of oral argument, this court was advised by counsel that appellant Cooper had died on May 21, 1967, during the pendency of this appeal. Thereafter, respondent's motion to

(Continued)

appellant's sentence at life imprisonment.

Appellants contend (1) that their extrajudicial statements were obtained without compliance with the rules enunciated in Miranda v. Arizona, 384 U.S. 436 [16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974]; (2) that their extrajudicial statements were not edited to prevent "cross-incrimination" as required by the retroactively applicable standards established in People v. Aranda, 63 Cal. 2d 518 [47 Cal. Rptr. 353, 407 P. 2d 265]; and (3) that the court erred in instructing on premeditated murder when, absent the application of the felony-murder doctrine the evidence was insufficient to sustain a verdict of first degree murder. We find no merit in these contentions.

The evidence is without material conflict. Defendants Bosby, Cooper and Harrington offered no defense, neither testifying themselves nor calling any witnesses to testify in their behalf. Defendant Rhone did take the stand but his version of the events in issue did not differ in any substantial way from that presented by the prosecution.

In summary, the evidence in support of the judgment establishes that appellants were seen to transfer from one car to another a short distance from the combination liquor and grocery

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1 (Continued) abate appellant Cooper's appeal, supported by a certified copy of the certificate of his death, was granted.

store owned and operated by Mrs. Robbins and her brother, Darrell Ashcraft. The time was approximately 2 p. m. on Friday, December 11, 1964, when Mrs. Robbins would have a large amount of cash on hand to enable her to cash the pay checks of the employees of the several businesses located near her store.

Appellants Cooper and Bosby entered the store at or about the same time. Cooper asked Mrs. Robbins if she would cash a pay roll check. She indicated that she would but would have to examine it first. Cooper, after reaching into his pocket, stated that he must have left his check in his car and went outside to get it. In the interim, Bosby engaged Mr. Ashcraft in conversation regarding a particular size bottle of wine. When Cooper returned he was accompanied by Harrington and Rhone who took positions within the front of the store. Mrs. Robbins remembered seeing them a few moments earlier outside her store recalling in particular Harrington's bright red hair. [2]

Although Mrs. Robbins testified that the check presented to her by Cooper and the accompanying identification appeared to be in order, she intuitively felt something was amiss. As she expressed it: "Yes, he [Cooper] handed it to me and I looked at it and I knew it was a good

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2 Apparently Rhone, Cooper and Bosby were readily identified as Negroes while Harrington was originally described as either white or a very light-skinned Negro.

check. I had cashed this company's checks before, but, I don't know, there was something about the way Mr. Rhone looked or something, I knew I wasn't going to open that box." By "box" she referred to a "check cashing register" in which the large sums of money were kept in addition to the regular amounts within the "main cash register."

At this point Mrs. Robbins heard and observed what appeared to her to be a "collision" between Bosby, who was in the rear of the store, and an elderly employee, Ben Serna. She testified that both men fell and when they arose she saw Mr. Serna moving towards her in a jerking fashion as if being prodded by Bosby whom she heard say, "Man, I told you not to give me any trouble."

While Mrs. Robbins' attention was diverted in the direction of Bosby and Mr. Serna, her brother, who could not see them from his position nearer the front of the store, observed Cooper and Harrington each draw a gun. Harrington told him to "Hold it." Mrs. Robbins testified that she continued to watch Bosby and Mr. Serna as they approached her, and observed that Bosby had a gun pressed against Mr. Serna's body. Mrs. Robbins then reached for her own gun which was kept in a drawer beneath the cash register but as she drew it out Rhone moved forward and seized her wrist and either he or Cooper removed the gun from her hand.

Mr. Ashcraft also saw his sister disarmed, and when he was told to move to the rear of the

store, he complied and tried to push his sister on ahead of him. At this point a shot was heard and while Mr. Ashcraft could not see who fired the shot, Mrs. Robbins testified that she saw Bosby shoot Mr. Serna at point-blank range. Serna took a few steps forward with blood running from his mouth and shirt front and then fell dead upon the floor. Both Mrs. Robbins and Mr. Ashcraft complied with the orders to move to the rear of the store but in the confusion of their exit the electric cord that supplied power to the register was pulled from its socket which prevented it from being opened. They exited through the rear of the store and when they returned appellants had departed.

Other witnesses saw appellants run to the car in which they had arrived and drive rapidly away, running a red light in the process. They were next seen moments thereafter then they again switched cars at the spot nearby where their second car waited with another man behind the wheel and the motor running.

The license number of the car used to leave the store was obtained by witnesses who had observed appellants' flight. Although appellant Cooper later asserted that the car "belonged" to him, it was registered to a third person in another part of Los Angeles. Subsequently, each of the appellants was arrested and each gave statements after being fully advised of their constitutional rights in accordance with the rules enunciated in People v. Dorado, 62 Cal. 2d 338 [42 Cal. Rptr. 169, 398 P. 2d 361].

The statements of Cooper, Bosby and Rhone were tantamount to confessions that they were attempting to rob the store when the shooting occurred but each denied committing the murder itself. Each statement involved all four defendants. Harrington admitted only that he had driven to the market with three Negroes but originally had remained in the car until he decided to follow them in order to purchase cigarettes. He admitted fleeing with "Jesse and Rhone" and spending the night with them in a motel in Pasadena where he dyed his hair from red to black and shaved off his moustache.

[1] Appellants' initial assignment of error, of course, was based upon the hope that California would choose to apply the additional requirements of Miranda v. Arizona, supra, 384 U.S. 436, retroactively as People v. Dorado, supra, 62 Cal. 2d 338, had applied the ruling in Escobedo v. Illinois, 378 U.S. 478 [12 L.Ed. 2d 977, 84 S.Ct. 1758]. Unfortunately for appellants, but fortunately for society, our Supreme Court declined the option permitted by Johnson v. New Jersey, 384 U.S. 719 [16 L.Ed. 2d 882, 86 S.Ct. 1772], and restricted the application of Miranda to cases tried after June 13, 1966. (People v. Rollins, 65 Cal. 2d 681, 683 [56 Cal. Rptr. 293, 423 P. 2d 221].)

[2] Nevertheless, although the statements of each appellant were properly admissible in evidence against such appellant, they are correct in their contention that the trial court did not anticipate and conform to the new rules regulating the use of extrajudicial statements

subsequently promulgated in People v. Aranda, supra, 63 Cal. 2d 518, 530-531. The partial retroactivity of these rules was established in People v. Charles, [a]66 Cal. 2d ___, ___ - ___ [57 Cal. Rptr. 745, 425 P. 2d 545]. This error, however, does not require automatic reversal. In People v. Lara, [b]67 Cal. 2d ___, ___ - ___ [62 Cal. Rptr. 586, 432 P. 2d 202], the Supreme Court most recently expressed itself in the following manner:

"The confession of each defendant implicated the other. On its face, this record shows a violation of the rules of practice declared in People v. Aranda (1965) supra, 63 Cal. 2d 518, 528-531, which require the trial court to determine whether those parts of a confession implicating a codefendant can be effectively deleted without prejudice to the declarant; and if they cannot, to sever the trials or exclude the confession. It must be acknowledged that the present trial took place before Aranda was decided, and fully complied with the requirement of limiting instructions under the prior law. However, since the Aranda rules govern in all cases still pending on direct review (People v. Charles (1967) [c]66 Cal. 2d ___ [57 Cal. Rptr. 745, 425

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[a]Advance Report Citation: 66 A. C. 325, 330-332.

[b]Advance Report Citation: 67 A. C. 367, 395-396.

[c]Advance Report Citation: 66 A. C. 325.

P. 2d 545]), the admission into evidence of certain of defendants' unedited confessions constituted error. But Aranda makes it clear (63 Cal. 2d at p. 527) that the error is reversible only if it causes prejudice. Here, as in Charles, each defendant's case was shattered in any event by the impact of his own detailed confession, and the fact that each was also implicated by his codefendant's confession cannot realistically have contributed to either conviction. In these circumstances, we are of the opinion that it is not reasonably probable that a result more favorable to defendants would have been reached had the Aranda rules been followed (Cal. Const., art. VI, §13; People v. Watson (1956) 46 Cal. 2d 818, 836 [299 P. 2d 243].)

"We do not mean to imply that a violation of the Aranda rules will be automatically nonprejudicial as to any defendant who has made a confession of his own. In every such case the issue remains whether the effect of any circumstances which might otherwise have mitigated the impact of the defendant's confession was overcome by the portions of a codefendant's statement implicating the defendant; in that event, the implication would be prejudicial despite the defendant's own confession. Such a situation might occur, for example, when the confessing defendant presented evidence to show his statement was not freely given, and also denied its truth on the witness stand. In the case before us, however, Lara made no such denial; on the contrary, he admitted he told the police the whole story of what had happened on the night of the killing." (See also our recent

extended analysis of this aspect of Aranda in People v. Wattie, [d]253 Cal. App. 2d ___, ___ - ___ [61 Cal. Rptr. 147].)

As we have previously indicated, the evidence against each appellant, apart from his own extrajudicial statement and those of his codefendants, was exceedingly strong. Their identity as the parties involved in the events within the market is not disputed. Their switching of cars before and after their entry upon the premises had been established. Three of the party had drawn guns and were directing the victims to the rear of the store when the fatal shot was fired. Cooper had cashed checks in the market previously and the inference is virtually inescapable that the four appellants, acting in concert, had entered the market at that particular time and on that particular day of the week with the intention of forcefully stealing the large amounts of cash which then would be present on the premises. They were engaged in the attempts so to do when the killing occurred.

None of the appellants either "presented evidence to show his statement was not freely given, [or] denied its truth on the witness stand." (People v. Lara, supra, [e]67 Cal. 2d at p. ___.) Rhone, the only appellant to testify in his own behalf, expressly conceded the free and voluntary

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[d]Advance Report Citation: 325 A. C. A. 459, 468-470.

[e]Advance Report Citation: 67 A. C. at p. 396.

nature of his extrajudicial statement and the overall accuracy and truthfulness of its contents. That is to say, Rhone testified that he and his codefendants had discussed the robbery in advance and the part each person was to play therein. They had definitely agreed that the robbery would occur on a Friday when the greatest amount of money would be obtainable. He corroborated each of the events described by the prosecution's witnesses. Further, he confirmed the fact that a futile attempt had been made to open the cash register after the shooting.

The sole defensive thrust of Rhone's testimony was his contention that although he had agreed to commit the robbery if the conditions in the market were favorable and as described to him by Cooper and Bosby, nevertheless when the conflict between Bosby and Mr. Serna had occurred, he had not as yet reached a decision and therefore his participation did not amount to an attempt to rob. For example, on direct examination the following questions and answers are reported: "Q. Then, is it your statement that although you went into the store to pull a robbery, you didn't have one? A. Well, no, not exactly. We went into the store to look at it. You see, I hadn't even seen it yet. Q. I see. That is, you wanted to case the place? A. Right."

Under cross-examination concerning his earlier statement to the police, Rhone further clarified the limited nature of his later version of the situation, and then, in effect, destroyed

any semblance of merit it might otherwise have presented: "Q. Then Officer Vaughn asked you, 'Did you and the previous persons I have just mentioned get together some place Friday and discuss or have a conversation pertaining to possibly robbing this market?' and you said, 'Yes, sir.' A. Yes, sir. Q. And he asked you, 'Approximately what time was that? And you said, 'About noon'? A. Yes, sir. Q. He asked you, 'Where was that?' And you said, 'In Compton'? A. Right. Q. He asked you, 'At your sister's house?' And you said, 'Yes'? . . . A. Yes, sir. Q. And then the officer asked you, 'Whose idea was this to rob the market?' And you said, 'It was Jesse's? A. Yes, sir. Q. He asked you, 'Did Jesse lay out the plans?' You said, 'Yeah.' 'To knock over the market?' And you said, 'Yeah'? A. Yes. Q. Then he asked you, 'Was Jesse Bosby or Gilbert Cooper to go in the market first or this white fellow known as Glen Harrington'? A. Yes, sir. Q. And you said, 'To try and cash a check'? A. Yes, sir. Q. Is that right? A. Right. Q. Was that the agreement? A. That's the way it was supposed to go, yes, sir. . . . Q. Is that the way you were going to do it that day? A. It wasn't decided whether we'd do it that day or not. . . . Q. Isn't that what happened that day? A. Thats what happened, yes, sir." (Italics added.)

We therefore, dispose of this aspect of the appeals of Rhone, Bosby and Cooper in the following apposite paraphrase of the holding in People v. Charles, supra, [f] 66 Cal. 2d ___,

[f] Advance Report Citation: 66 A. C. 325, 333-334.

___ - ___ : "Turning first to the basic Aranda violation, we consider crucial the fact that each defendant's case was completely shattered by his own detailed confession, corroborated by the eyewitness testimony of [the independent witnesses and] the robbery victim[s]. In this setting, the fact that each defendant was also implicated by his codefendant[s] confession cannot realistically have contributed to [his own] conviction. . . . [W]e find no reasonable probability in this case that [the] jury would have returned a more favorable verdict for [appellants] if, as required by Aranda, the defendants had been tried separately or each confession had been 'edited' to include no references damaging to the nondeclarant[s]." [3]

Although it is true that appellant Harrington did not make a confession, nevertheless he did

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3 In this regard it is rather ironic to note that with remarkable prescience and with the careful attention he gave to appellants' rights throughout the trial the trial court in the instant case initially actually had required the statements to be edited prior to being presented to the jury. For his pains he was accused by one defense counsel of increasing the prejudicial effect of the statements because it was then impossible for the jury to hear which party had done what and therefore they might conclude that his client had done more than he actually had. The court therefore reversed itself and permitted the statements to be introduced as given in order to be fair to appellants!

admit that he was the red-haired man who had entered the store with his three Negro companions; that he had fled with them after the murder; and that thereafter he had dyed his hair black and shaved off his moustache. Inasmuch as the victims of the robbery had testified that Harrington had drawn a gun, ordered Ashcraft to "Hold it," and that they were moving to the rear of the establishment as directed when Mr. Serna was killed, it is virtually inconceivable that any jury could have escaped the conclusion that Harrington was engaged in an attempted robbery and was answerable for the murder committed by his co-conspirator in the course thereof.

[3] Appellants' final contention based upon alleged error in instructing the jury is unmeritorious for two reasons. First, it was perfectly and unmistakably clear from the moment that the prosecution made its opening statement to the jury, until it closed its final argument, that the instant case was being tried upon the theory of the felony-murder doctrine. No indication was ever given at any time that the prosecution was contending that Mr. Serna's death had been specifically deliberated and premeditated in the ordinary usage of these terms. In addition, the court did not give any instruction concerning premeditation in first degree murder. (Cf. CALJIC 303.) The sole basis for appellants' argument on this issue arises from the apparently inadvertent failure of the trial court to completely strike that portion of CALJIC 302-A [4]

[4] CALJIC 302-A is a verbatim quote of Penal Code, section 189.

that refers to premeditated killings. As given, the instruction was only partially deleted as follows: "All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 of the Penal Code, is murder of the first degree, and all other kinds of murder are of the second degree."

Inasmuch as the court did not instruct on premeditation but did give complete instructions on murder in the commission of certain felonies (CALJIC 302-F), murder of the second degree (CALJIC 305), and voluntary manslaughter (CALJIC 308-A, 310, 311, 311-A, 305-AA), we conclude that the jury was not confused as to the issues submitted for their determination. As presented to them by the prosecution, each defense counsel and by the court, the degree of the murder was to be determined solely upon the basis of the felony-murder doctrine.

However, in disposing of this assignment of error on this basis, we do not imply that appellants are correct in their basic contention that the evidence would be insufficient to warrant giving an instruction on premeditated murder quite apart from the felony-murder doctrine. As observed by the Supreme Court in People v. Washington, 62 Cal. 2d 777, 781-782 [44 Cal. Rptr. 442, 402 P. 2d 130]:

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[4] "A defendant need not do the killing

himself, however, to be guilty of murder. He may be vicariously responsible under the rules defining principals and criminal conspiracies. All persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design. [Citations.] Moreover, when the defendant intends to kill or intentionally commits acts that are likely to kill with a conscious disregard for life, he is guilty of murder even though he uses another person to accomplish his objective. [Citations.]

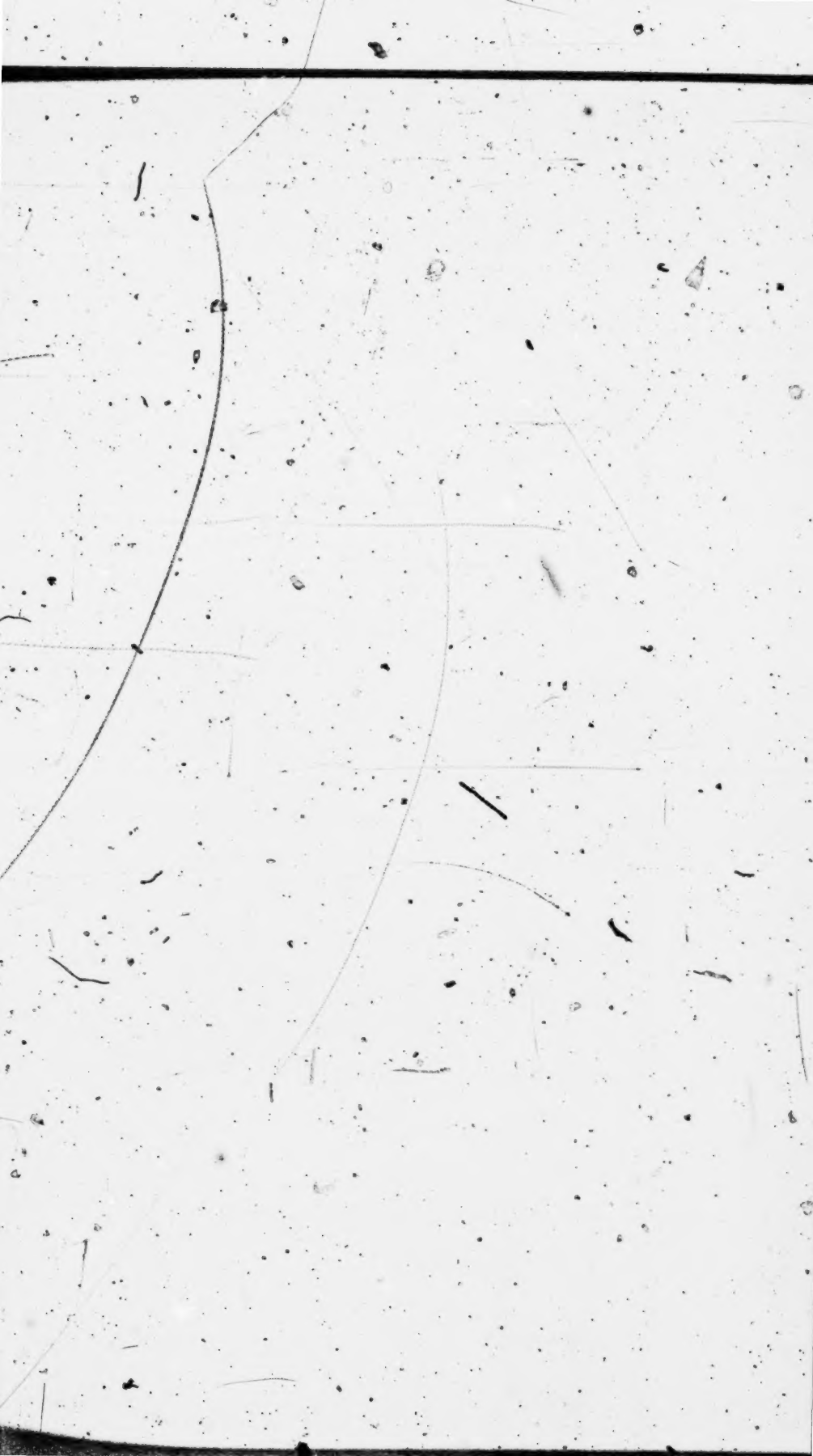
"Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill. Under such circumstances, 'the defendant for a base, anti-social motive, and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death' [citation], and it is unnecessary to imply malice by invoking the felony-murder doctrine. To invoke the felony-murder doctrine to imply malice in such a case is unnecessary and overlooks the principles of criminal liability that should govern the responsibility of one person for a killing committed by another. [Citations.]"

When four men arm themselves with deadly weapons and enter a public market for the purpose of robbing it, or even "to case it" as appellant Rhone asserted, it seems clear that " 'for a base, antisocial motive and with wanton disregard for human life, [they commit] an act that involves a high degree of probability that it will result in death.' " (People v. Washington,

supra, 62 Cal. 2d at p. 762.)

The judgments are affirmed.

Roth, P. J., and Fleming, J., concurred.



SUPREME COURT, U. S.

MAR 14 1969

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 750

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

CALIFORNIA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION 2

PETITIONER'S BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 750

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION 2

OPENING BRIEF FOR PETITIONER, GLENN MARTIN HARRINGTON

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Glenn Martin Harrington, having been granted his petition for a Writ of Certiorari on November 18, 1968 by this Honorable Court, comes now by his attorney, Roger S. Hanson, and herewith presents his opening brief:

Opinion Below

The opinion of the Court of Appeals of the State of California, Second Appellate District, Division 2, is entitled People of the State of California vs. Jesse Bosby, Gilbert Cooper, George Rhone, and Glenn Martin Harrington, and is officially recorded at 256 A.C.A. 555; said opinion is reprinted verbatim in the Appendix "A" of petitioner's Petition for Certiorari, and is also set forth in the Single Appendix at Page 429.

Petitioner sought a hearing and review in the Supreme Court of the State of California and the Order Denying Hearing was filed on January 17, 1968, over the mandate of Chief Justice Roger J. Traynor of California. Said Order Denying Hearing is set forth verbatim in the Single Appendix at Page 441.

Jurisdiction

The jurisdiction of this Honorable Court is invoked under Title 28, U.S.C.A., Section 1257.

Questions Presented

Petitioner heretofore in his petition for a Writ of Certiorari posed the following six issues to this Honorable Court:

1. Does the joint trial of codefendants in a criminal proceeding before a jury composed of lay citizens where confessions of codefendants implicating this petitioner are introduced in evidence and where said codefendants do not take the witness stand for cross examination purposes vio-

late the confrontation clause of the 6th Amendment and the due process clause of the 14th Amendment to the United States Constitution?

2. Does the process of instructing that lay jury that they are to consider the confessions only as evidence against the confessor and not as evidence against the implicated party sufficiently guarantee due process of law under the 14th Amendment to the party implicated in view of this Honorable Court's ruling in *Jackson* v. *Denno* (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774?

3. Is the doctrine of *Delli Paoli* v. *United States* (1957), 353 U.S. 232, 1 L.Ed.2d 278, 77 S.Ct. 294 still valid law in view of the combined effect of the decisions of this Honorable Court in *Jackson* v. *Denno* (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774, *Turner* v. *Louisiana* (1965), 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546, *Pointer* v. *Texas* (1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065, *Douglas* v. *Alabama* (1965), 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 and *Brookhart* v. *Janis* (1966), 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245?

4. Does not the combined effects of the above cited cases in question 3, interpreting the 6th and 14th Amendments, require, as a protection of a specific constitutional right, that procedures as set forth by the Supreme Court of the State of California in *People* v. *Aranda, et al.* (1965), 63 Cal. 2d 518 be now regarded as the law of the land?

5. Because this violation of this specific constitutional right involves the violation of a right protected by the United States Constitution, is not a reviewing Court re-

quired to apply a harmless error test at least as strict as that announced in *Chapman* v. *California* (1967), 386 U.S. 18, 23, 17 L.Ed.2d 705, 87 S.Ct. 824, viz: "the prosecution must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained?"

6. Does not the denial of a motion to sever the moving party's trial from that of his codefendant amount to a denial of due process of law whenever said joint trial will require the jury to determine both the voluntary nature and truth of an extrajudicial statement which incriminates both the maker and his codefendant?

Petitioner herewith respectfully adds these 7th, 8th and 9th issues:

7. DOES NOT THE LANGUAGE OF THE HONORABLE JUSTICE HUGO L. BLACK, EXPRESSING THE VIEWS OF EIGHT MEMBERS OF THIS COURT, FOUND IN *BROOKHART* v. *JANIS*, 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245, AT PAGE 316 OF 16 L.Ed.2d 314, NAMELY:

"IN THIS COURT RESPONDENT ADMITS THAT:

"[I]F THERE WAS HERE A DENIAL OF CROSS EXAMINATION WITHOUT WAIVER, IT WOULD BE A CONSTITUTIONAL ERROR OF THE FIRST MAGNITUDE *AND NO AMOUNT OF SHOWING OF WANT OF PREJUDICE WOULD CURE IT.*"

"THIS CONCESSION IS PROPERLY MADE.",

PRECLUDE APPLYING *ANY* HARMLESS ERROR RULE TO THIS PETITIONER'S CASE?

8. DOES NOT THE RULINGS OF THIS HONORABLE COURT IN *GEORGE WILLIAM BRUTON* v. *UNITED STATES*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, DECIDED MAY 20, 1968, AND *ROBERTS* v. *RUSSELL*, 392 U.S. 293, 20 L.Ed.2d 1100, 88 S.Ct. 1921, ANSWER THIS PETITIONER'S ISSUES CITED ABOVE IN HIS FAVOR, REQUIRING THIS HONORABLE COURT TO REVERSE HIS CONVICTION?

9. DOES NOT THE APPLICATION OF THE FEDERAL HARMLESS ERROR RULE, AS ENUNCIATED IN *CHAPMAN* v. *CALIFORNIA* (1967), 386 U.S. 18, 23, 17 L.Ed.2d 705, 87 S.Ct. 824, IF THIS COURT DEEMS IT REQUIRED SHOULD IT RESOLVE ISSUES 7 AND 8 UNFAVORABLE TO THIS PETITIONER, REQUIRE PETITIONER'S CONVICTION BE REVERSED?

United States Constitutional Provisions Involved

1. 6th Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

2. 14th Amendment

Section 1

"... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner Glenn M. Harrington, along with codefendants Jesse Bosby, George Rhone and Gilbert Cooper, were charged with attempted robbery and first degree murder in the alleged attempt to rob a grocery store and market in Los Angeles, California.

All were brought to trial jointly in the Superior Court of the State of California for the County of Los Angeles before the Honorable Joseph Wapner.

Petitioner Harrington is a Caucasian, and the other three codefendants are Negroes. Although petitioner Harrington was allegedly identified as being at the scene of the crime, the proprietor of the store testified that she told police that "all four defendants were Negro" and other evidence tended to undermine the identification made of petitioner Harrington as an active participant in the robbery and murder.

In pre-trial incustodial interrogation, extensive confessions were obtained from all three codefendants, implicating Glenn M. Harrington. All three confessions were read before the jury. Two of them consisted of documents over

30 pages in length. Harrington made no confession and pled not guilty. Defendant Rhone did take the stand for cross-examination, but the other two codefendants did not. "Appropriate" limiting instructions to consider each of these extensive confessions only against the confessor were read to the jury.

It is thus evident that three major, repeated, machine-gun-like, impacting confessions implicating petitioner Harrington were read to the jury; that these three codefendants served as witnesses against Harrington cannot be seriously doubted unless one indulges in the fiction that the lay jury could effectively compartmentalize its mind to give no credence to the repeated implications of Harrington by the other defendants. Harrington was denied the opportunity to cross-examine defendants Cooper and Bosby at all for the reason they chose to invoke their constitutional rights not to be witnesses against themselves.

All four defendants were convicted of first degree murder; said convictions were affirmed by the California State Court of Appeals, Second Appellate District, 256 A.C.A. 555, despite the court's acknowledgment of the violation of the California "Aranda Rule", *People* v. *Aranda*, 63 Cal.2d 518. The Supreme Court of California denied a Petition for Hearing on January 17, 1968, and its Order became final 30 days later, February 16, 1968.

Petitioner Harrington via his trial counsel made numerous and repeated motions to have his trial severed from the other three codefendants. In a pre-trial motion, said request was denied. After assignment to the trial court, the Single Appendix on the following pages indicates the extensive efforts expended by counsel:

Single Appendix Page 34; Single Appendix Page 49.

It is to be noted that counsel for Harrington ably and repeatedly cited the *United States* v. *Delli Paoli* and *Jackson* v. *Denno* decisions (S.A. Page 37) as authority for his argument to sever the trials. At all times, the motions were denied by the trial court.

The trial court, acutely aware of the problem, joined in extensive efforts to "edit" each one of the confessions. After numerous attempts, petitioner's counsel complained that, after the extensive editing job to blank out the names of codefendants, the jury would no longer be able to ascertain the extent to which each defendant participated. Because of this, the trial court abandoned effort to delete names and inculpatory phraseology and allowed each lengthy confession to be read in its entirety. In the Single Appendix at page 176 begins the extensive effort of the trial court to edit the confession of defendant Gilbert Cooper. The procedure occupied some 36 pages of effort of the trial court in the transcript.

On page 215 of the Single Appendix, the court began supervising the editing job of the confession of Jesse Bosby. Petitioner Harrington's counsel, at page 216 Single Appendix, entered timely objections to the deletion process, as it replaced the concrete names with ambiguous phrases such as "this other man"; the name of codefendant Cooper was here changed to "this other man", and petitioner's attorney felt the jury might speculate that "this other man" might be Harrington. Numerous other objections to the process were entered by respective counsel.

In finality, the trial judge felt that petitioner's counsel was accusing him of making the situation worse for peti-

tioner after the deletions than before, and allowed (see pages 234-242 Single Appendix) all incriminating confessions into evidence totally unedited. In this way, with the three Negroes making confessions each implicating each other and petitioner Harrington, there is little doubt that the lay jury had no difficulty in concluding that all three codefendants before the court were involved, and each implicated petitioner by their confession.

Interestingly, the police officer who was to read the edited, greatly altered statements to the jury voiced his own objections to the trial judge (pages 235-237 Single Appendix). As altered, *no names at all appeared*, and the officer felt the jury would believe him an incompetent police investigator because he had failed to ascertain the names of the parties involved!

In finality, then, for the purposes of the brief, petitioner Glenn Martin Harrington was tried with three codefendants, all of whom made confessions implicating Harrington. Editing of said confessions was attempted by the trial judge and all counsel, but was abandoned when the result became ridiculous. All three unedited confessions implicating petitioner were read to the twelve men lay jury with "appropriate" instructions to consider each only against the confessor. Two of the three codefendants failed to take the stand for cross-examination purposes. Petitioner contends each codefendant was a witness who testified against petitioner without confrontation because of the inability of a lay jury to distinguish and compartmentalize the facts in their minds, restricting it only to the confessor.

Upon the authority of *Jackson* v. *Denno* (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774, *Pointer* v. *Texas* (1965),

380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065, *Douglas* v. *Alabama* (1965), 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 and *Brookhart* v. *Janis* (1966), 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245, petitioner contends he has been denied the right to confront all the witnesses testifying against him, and has therefore been denied Due Process of Law under the Sixth and Fourteenth Amendments to the United States Constitution.

Since petitioner filed his Petition for a Writ of Certiorari, this Honorable Court decided two significant cases, *Bruton* v. *United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, on May 20, 1968, and *Roberts* v. *Russell*, 392 U.S. 293, 20 L.Ed.2d 1100, 88 S.Ct. 1921.

Petitioner contends the rulings of these cases should cause this Honorable Court to reverse his conviction.

Petitioner's case, however, has the following significant factors:

(1) Codefendants Gilbert Cooper and Jesse Bosby made extensive confessions inculpating petitioner; neither codefendant took the stand for cross-examination purposes and petitioner was therefore denied his right of confrontation within the meaning of *Brookhart* v. *Janis*, *Bruton* v. *United States*, and *Roberts* v. *Russell*.

(2) Codefendant George Rhone made an extensive confession inculpating petitioner, but did take the stand for cross-examination, and petitioner did exercise his right and opportunity to cross-examine codefendant Rhone.

(3) Petitioner himself made statements falling short of either an admission of guilt or confession, which placed him at the scene of the crime, which were read to the jury, and

which were held by the Court of Appeals at 256 A.C.A. 555 to satisfy the Advisement of Constitutional Rights then required under California law in *People* v. *Dorado*, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361. (Page 432, Single Appendix.)

(4) Several eyewitnesses, among them Ardis Allison Robbins and Darrell Ashcraft, placed petitioner at the scene of the crime, armed and actively participating in said crime.

(5) Both prosecution witnesses Robbins and Ashcraft admitted during trial that they had told police "four Negroes committed the crime"; petitioner is a Caucasian and codefendants Rhone, Bosby and Cooper are Negroes.

(6) This Honorable Court's opinions in *Bruton* v. *United States*, 391 U.S. 123, and *Roberts* v. *Russell*, 392 U.S. 293 are silent on the following significant issues:

a. Was there any independent evidence in addition to the confession of the codefendant incriminating either Bruton or Roberts which could have independently sustained the conviction?

b. Did either Bruton or Roberts themselves make any incriminating statements?

c. Is the federal harmless error rule to be applied in the cases evidencing the Bruton or Roberts error, or for that matter,

d. Shall it be required to have recourse to a harmless error rule at all?

This petitioner shall develop his arguments and authority directed to answering and discussing the above six signif-

icant factors, and the included subdivisions, as well as developing issues 7, 8, and 9 as set forth above in this Opening Brief.

ARGUMENT

I.

Petitioner's Conviction Should Be Reversed Automatically Because the Lack of Confrontation and Denial of Cross-Examination Was a Constitutional Error of the First Magnitude, and No Amount of Showing of Want of Prejudice Would Cure It.

Justice Black of this Honorable Court, in writing for the 8-man opinion of the Court in *Brookhart* v. *Janis,* 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245, at P. 316 of 16 L.Ed.2d 314 stated:

"In this Court respondent admits that:

> "'[I]f there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'"

[1-3] This concession is properly made. The Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . " And in Pointer v. Texas, 380 US 400, 406, 13 L.ed.2d 923, 927, 85 S Ct 1065, we held that the confrontation guarantee of the Sixth Amendment including the right of cross-examination "is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.' Malloy v.

Hogan, supra, 378 US, at 10 [12 L.ed.2d at 661]." See also Douglas v. Alabama, 380 US 415, 13 L.ed.2d 934, 85 S.Ct. 1074. It follows that unless petitioner did actually waive his right to be confronted with and to cross-examine these witnesses, his federally guaranteed constitutional rights have been denied in two ways. In the first place he was denied the right to cross-examine at all any witnesses who testified against him. In the second place there was introduced as evidence against him an alleged confession, made out of court by one of his co-defendants, Mitchell, who did not testify in court, and petitioner was therefore denied any opportunity whatever to confront and cross-examine the witness who made this very damaging statement. We therefore pass on to the question of waiver."

In the above case, it is acknowledged that the purpose of introducing the alleged confessions of the codefendant Mitchell was the avowed used of same against petitioner Brookhart; this Honorable Court struck that down as unconstitutional under the withholding of right to cross-examine a witness *who testified against Brookhart.* In the instant case, the respondent State of California sought to cure the error, or prevent the error, by "appropriate" jury instructions.

Instructions to the jury on this point are totally inadequate to prevent this "Constitutional error of the first magnitude."

In *Bruton* v. *United States,* this Honorable Court, speaking through Justice William Brennan stated at 479 of 20 L.Ed.2d 476:

> "We hold that, because of the substantial risk that the jury, *despite instructions to the contrary,* looked to

> the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evan's confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule Delli Paoli and reverse."

Hence, it is submitted that in considering the mandates of *Brookhart* v. *Janis* and *Bruton* v. *United States* together, there is no room nor possibility for the application of any "harmless error rule," for "if there was here a denial of cross-examination without waiver, it would be a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." (16 L.Ed.2d 314, 316)

The fact that codefendants Gilbert Cooper and Jesse Bosby did not take the stand at all, but the prosecution read their confessions unedited to the jury, creates the error; it is submitted that regardless of any other evidence tending to show this petitioner Glenn M. Harrington guilty of committing this crime, the aforementioned "constitutional error of the first magnitude" occurred, and it is futile for the respondent State of California to argue that there was want of, or lack of, prejudice.

Petitioner has researched the law in several of the leading state jurisdictions to glean state authority for this holding this error a constitutional infirmity. It seems clear that the leading jurisdictions of Massachusetts, Illinois, New York, Ohio, and California have all recognized the error and have sought to prevent it by mandate of their highest state tribunals.

In a case recently celebrating its 100th birthday, the Supreme Judicial Court of Massachusetts set forth the Rule in the Commonwealth which still is valid law. In *Commonwealth* v. *Silas James and another* (1868), 99 Mass. 438, 440, Chief Justice Chapman stated:

> "The general rule is, that persons jointly indicted should be tried together. It is conceded that the court may in its discretion order separate trials. This should not be done unless it appears that one or more of the defendants may be prejudiced by a joint trial. The fact that it may affect their right of challenge is not a sufficient reason for directing separate trials. If it were, it would be a reason for changing the general rule, as it applies to all cases. But in the present case, if the Commonwealth intends to offer in evidence the whole confession of Charles T. James, its application to Silas James as well as to himself may prejudice Silas, and the motion should be granted. We regard this, however, as an exceptional case. It will generally be safe to try parties together, although some admissions may be made by one that are not binding on the other."

The opinion states the facts of that case, leading the Chief Justice of Massachusetts to the conclusion which he ultimately arrived:

> "Indictment against Silas James and Charles T. James for the murder of Joseph G. Clark.
>
> Before the jury were called, the counsel of Silas James moved that he might have a separate trial, assigning specially as reason therefor that in support of the prosecution evidence would probably be introduced of a confession by Charles T. James, which implicated

both himself and Silas in the commission of the crime as charged in the indictment. And the testimony of a witness before the coroner's jury was read, which tended to prove such confession.

G. F. Verry & S. Utley, for Silas James. It is the custom to grant separate trials of prisoners indicted together, whenever requested. *United States* v. *Marchant*, 4 Mason, 170, 171. In the present case, the evidence of the confession will be competent against one of the prisoners, and incompetent against the other; but neither counsel nor court could prevent its having an effect upon the minds of the jury against Silas. Certainly the court would feel it a duty to keep this evidence from prejudicing the case of Silas. See *Commonwealth* v. *Robinson*, 1 Gray, 555. But as the confession itself implicates Silas in express terms, his case could not fail to be prejudiced. Besides: if the two prisoners are tried together, each has his right to challenge twenty-two jurors peremptorily. The result may follow that one of the prisoners will challenge certain jurors whom the other would wish to retain upon the panel; and thus the rights of each will be prejudiced."

It is to be noted and called to the attention of this Honorable Supreme Court of the United States that as early as 20 years hereto prior, the learned Ohio State Supreme Court considered the prejudicial effect created by jointly trying two or more defendants in the same proceedings, using the implicating confession of one defendant in the same trial with "appropriate" instructions to the jury to consider it only against the maker and disregard it against any codefendant implicated.

Typical of these is a 1949 decision of the Supreme Court of Ohio, which unanimously reversed defendant-appellant Rosen's conviction, creating in Ohio a rule similar to the California Supreme Court's "Aranda Rule," *People* v. *Aranda,* 63 Cal.2d 518. This Rule of course is tantamountly similar and analogous to this Honorable Court's Rulings in *Bruton* v. *United States,* 391 U.S. 123 (May 20, 1968), and its decision making retroactive the Bruton Rule and applying it to the States via the 14th Amendment Due Process Clause, *Roberts* v. *Russell,* 392 U.S. 293 (June 10, 1968).

In *Rosen* v. *State of Ohio,* 151 Ohio St. 339, 39 Ohio Opinions 182, 183, Justice Matthias wrote for the unanimous Supreme Court of Ohio:

"Although the original application for a separate trial was based on "conversations" said to have occurred between codefendants of Rosen and police officers, the *renewal* of the application was based upon the announcement of the prosecuting attorney that he expected to offer in evidence the confession of a codefendant."

The Ohio Supreme Court pointed out that the same issue arose before in *State* v. *Fox,* 133 Ohio St. 154, 10 Ohio Opinions 218, 12 N.E. 2d 413, but that failure of the defendants counsel to object and ask for separate trials precluded the Supreme Court of Ohio from reviewing that issue.

Continuing in the opinion in *Rosen* v. *Ohio,* the Supreme Court of Ohio stated:

"In the instant case the application for a separate trial was based upon the specific ground of the proposed introduction of a codefendant's confession containing statements claimed to be prejudicial to Rosen. It was the clear duty of the trial court, when his attention was challenged to the

claimed prejudicial character of the confession, to hear and determine that question . . . The fact must be recognized, however, that in many cases the admission of such ex parte statements creates impressions so adverse that they may not be eradicated from the minds of the members of the jury. The prejudicial matter should be stricken out or deleted before the confession is admitted in evidence. The statement in the alleged confession indicated Rosen had planned, or at least participated in planning, the crime and received a portion of the proceeds thereof . . . There was thrust upon the defendant Rosen the burden of refuting the ex parte statement against him by a codefendant . . . In our opinion the action of the trial court constituted an abuse of discretion resulting prejudicially to the defendant Rosen."

"The judgment of the Court of Appeals is, accordingly, reversed and the cause is remanded to the Court of Common Pleas for a new trial."

It is to be noted that the conviction of Rosen was reversed without further consideration of the particular prejudicial effect of the confession, that is, apparently without recourse to a "harmless error rule."

The Ohio Supreme Court reaffirmed its *Rosen* decision unanimously on November 23, 1949 in *Marie Abbott* v. *Ohio,* 152 Ohio St. 228, 40 Ohio Opinions ——, in a potential capital case. It is to be noted that in *Abbott, supra,* the Ohio Court made its *Rosen* ruling retroactive, noting that:

"In justice to the trial Court in the instant case (Abbott), it should be stated in passing upon this question the Court did not have the benefit of the views of this court on a similar question later decided in the case of State v. Rosen,

151 Ohio St. 339, 39 Ohio Opinions 182, 86 N.E.(2d), 24, to which reference will hereinafter be made."

Again, in *Abbott*, the Ohio Court, like in *Rosen*, made no reference to a "harmless error rule."

The error was deemed to be inherently prejudicial.

The Supreme Court of Illinois in a lengthy series of cases dating back to the year 1916 clearly established the Illinois viewpoint on the joint trial of codefendants with use of confessions made by one codefendant in the joint trial, even though tempered by instructions to the jury to disregard the confession as against the non-maker.

In *People of the State of Illinois* v. *Frederick Buckminster*, June 22, 1916, the Illinois High Tribunal stated, inter alia, at 444 of 274 Ill. 435:

"Even if it be assumed that the confession could be admitted against Fink for the purpose of impeaching him if he were being tried alone, we do not think that part of his confession which affected Buckminster, in view of the record before us, should have been admitted for any purpose when Buckminster was on trial jointly with Fink. It has long been the settled rule of law that the voluntary confession of one person made after the commission of the crime cannot be admitted against a co-defendant unless made in the presence of the co-defendant and assented to by him. (I R. C. L. 520; 12 Cyc. 440; 2 Wharton's Crim. Evidence,—10th ed.—secs. 699, 700) But if co-defendants are tried together, the usual rule has been to hold that such confession can be admitted against the one who made it, with instructions by the court to the jury that it is only admitted against that one defendant, and is not to be considered as evidence against his co-defendant. (I R. C. L.

574, and cited cases; 6 Am. & Eng. Ency. of Law,—2d ed. —572.) The wisdom of this rule has been questioned more than once. In some of the earlier English cases the judges ruled that the confession, when admitted, should not contain the name of the other prisoner implicated thereby (Archbold's Crim. Pr. & Pl.—Waterman's 7th ed.—409), and it has sometimes been stated that it was impossible not to feel that such a confession, even though limited by instructions to apply only to one defendant, must inevitably have its effect upon the minds of the jury as to the other defendant. (Rex v. Martin, 4 Ann. Cas. 912.) In the opinions in that case, and the note attached thereto, the authorities on this question are reviewed. To obviate the evils arising from the possibility of the jury being misled by such confessions against the co-defendant, the rule is general that where one of several defendants jointly indicted has made admissions or confessions implicating others, a severance should be ordered unless the attorney for the State declares that such admissions or confessions will not be offered in evidence on the trial. (19 Ency. of Pl. & Pr. 528; Wharton's Crim. Pl. & Pr.—9th ed.—sec. 310; I Bishop's Crim. Proc.—3d ed.—sec. 1019a.) Some of the cases have stated that, on the plainest principles of justice, if the prosecutor intends to use such confession the prisoners should be tried separately. (Queen v. Weir, 3 Can. Crim. Cas. 351; Rex v. Martin, supra.) It is very clear from all the authorities that the courts have realized the evils of admitting confessions on behalf of one defendant that implicated a co-defendant, even though limited by the trial court to the person who made the confession, and have only permitted such a confession to be admitted, when two were being tried jointly, because there seemed no prac-

tical way of reaching a right result, under the law, as to the person who made the confession, without admitting it; that the injury as to the co-defendant might be less than the evil that would arise in the enforcement of the criminal law if the confession were shut out entirely. Indeed, the opinions in *Rex* v. *Martin, supra,* indicate that the judges there might not have held that such a confession was competent for any purpose when it implicated a co-defendant, if they had not thought it was the settled law under former decisions.

If the part of the confession that pertains to the guilt of the co-defendant can be properly left out without in any way weakening the confession as to the one who made it, we can conceive of no reason why the court should not rule that only that part of the confession be admitted that does not in any way implicate the co-defendant. While the point has never been passed upon directly by this court, when the question was necessary for the decision of the case, it has been plainly intimated in two cases that this ought to be done even as to voluntary confessions. In *People* v. *Anderson,* 239 Ill. 168, the court said (p. 180): "No man can confess for anyone but himself. As above indicated, however, each statement contained admissions of fact which the jury might rightfully regard as tending to show the guilt of the man making the statement. If there was in either statement anything the effect of which was to indicate the guilt of Anderson without tending to show the guilt of the man making the statement, that part of the statement was not properly admissible in this case, where Anderson was on trial." Again, in *McCann* v. *People,* 226 Ill. 562, the court said (p. 569): "In the first part of the written statement of Philip McEwen he admitted he was present in the after-

noon and evening on the occasion of the shooting. The objection of the plaintiff in error to the admission of said statement went to the entire statement, and not to that part, only, which tended to incriminate the plaintiff in error. Had the objection been limited to the part of the statement which tended to incriminate the plaintiff in error the objection would doubtless have been sustained."

"The authorities have frequently stated that voluntary confessions should be closely scrutinized, and it is generally held that they must be corroborated in order to sustain a conviction. (2 Wharton's Crim. Evidence,—10th ed.—sec. 635; 1 Wigmore on Evidence, 866; Bergen v. People, 17 Ill. 426; South v. People, 98 id. 261; Campbell v. People, 159 id. 9; Brown v. People, 91 id. 506.) If this be the rule as to the character and weight of voluntary confessions when admitted against the person who made them, there is surely much more reason to place about the admission of an involuntary confession which affects a person in no way responsible for it, every safeguard possible under a due and proper administration of the law and such a confession certainly should not be admitted, so far as it affects the guilt or innocence of a third party, if justice can be otherwise administered."

"Our attention has not been called to any case in the briefs, and we know of none, where this precise question, under the circumstances shown in this record, has been passed upon, but on reason and by the application of the principles that have become settled law by other decisions, we cannot see why the criminal law cannot be more justly and wisely enforced by holding that the part of the confession which affected Buckminster should have been refused admission. The reading of this confession admitted

in evidence shows clearly that Fink had confessed his own guilt before he said anything as to Buckminster being connected with the crime. The trial court should have sustained plaintiff in error's objection to admitting that part of the confession that connected him in any way with causing the fire."

It is to be noted that in this 1946 case, the Illinois Supreme Court refuted any possibility that this type of error be subjected to a "harmless error rule" analysis; continuing at Page 447, the Court stated:

"Counsel for the State argue that even though this evidence was improperly admitted, the guilt of plaintiff in error is so clearly shown by other evidence properly in the record that the admission of the confession, when by an instruction of the court it was strictly limited in its effect to Fink, could not injuriously have affected plaintiff in error. With this we cannot agree. The admission of improper testimony that would have a tendency to warp or prejudice the minds of the jury can hardly be considered harmless on this record. This confession was highly prejudicial to plaintiff in error. It would be impossible to decide with any certainty as to whether it would or would not unconsciously affect the jury as to their verdict. If from the legal evidence admitted they had any doubt as to the guilt of plaintiff in error, the jury would not find it easy, or perhaps possible, to remove from their minds the impression produced by this confession."

This Honorable Court's attention is called also to *People* v. *Barbaro*, 395 Ill. 264, a 1946 decision of the Supreme Court of Illinois. Thus it is clear that in Illinois, an error such as the instant case presents would cause a reversal on the merits without any recourse to a "harmless error rule."

Petitioner urges the above analysis on this Honorable Court; petitioner urges that the combined results of *Brookhart* v. *Janis* and *Bruton* v. *United States*, cited *supra*, require reversal without reference to a "harmless error rule."

In similarly strong language, the Supreme Court of Illinois considered the problem of severance and joint trials in *People* v. *Patris*, 360 Ill. 596, 600:

"Currin did not testify. The conviction of Patris depended largely upon the testimony of the police officers as to Currin's confession implicating Patris. Their testimony as to what Currin said out of the presence of Patris about the bombing of the Michigan avenue place was highly prejudicial *and it is impossible to know the extent of its effect upon the jury.* It is apparent that the very situation arose which was anticipated by defendant's counsel when the petition for a severance was filed. The court was advised of the prejudice to defendant which would arise from testimony as to admissions and confessions made out of the presence of defendant, and that an instruction to the jury to disregard it would not remedy the matter."

"The general rule is, that those indicted jointly for the commission of a crime are to be tried together. The matter of granting a separate trial is within the discretion of the court and may not be assigned as error in the absence of abuse of such discretion. Confessions or admissions of one charged with a crime, made out of the presence of a co-defendant, are not competent as against the co-defendant. (People v. Barragan, 337 Ill. 531; People v. Buckminster, 274 id. 435; McCann v. People, 226 id. 562; People v. Johnson, 333 id. 469.) When a motion for a separate trial is made on the ground of a confession by a co-

defendant implicating the mover, a severance should be ordered unless the State's attorney declares that the admissions or confessions will not be offered in evidence upon the trial or unless there be eliminated from the confessions any reference to the co-defendant applying for a severance. (People v. Fisher, 340 Ill. 216; People v. Sweetin, 325 id. 245; People v. Buckminster, supra.) It has been held that, on the plainest principles of justice, if the prosecutor intends to use such confession the prisoner shall be tried separately. (People v. Sweetin, supra; People v. Buckminster, supra; People v. Carmichael, 314 Ill. 460) While it is generally a matter of discretion with the court as to whether a separate trial shall be granted, such discretion is not to be exercised arbitrarily but so as to prevent injustice. *The court instructed the jury to disregard the testimony as to the admissions of Currin made out of the presence of Patris, but the instruction could not cure the damage already done. While, theoretically, the instruction withdrew the evidence from the consideration of the jury, nevertheless the prejudicial effect of the testimony inevitably remained.* People v. Sweetin, supra; People v. Carmichael, supra."

"The denial of the petition for a severance, under the circumstances shown by the record, was an abuse of the court's discretion and undoubtedly contributed largely to the conviction of the defendant. Upon his guilt or innocence we express no opinion, but the constitution guarantees to every person accused of crime, whether innocent or guilty, a fair and impartial trial, and no person should be condemned who has been deprived, over his objection, of such a trial. People v. Sweetin, supra; People v. Bimbo, 314 Ill. 449.

On account of the errors pointed out, the judgment of the criminal court is reversed and the cause is remanded for a new trial.

Reversed and remanded."

In this 1935 case, the "no harmless error rule—automatic reversal" standard was reaffirmed.

The California "Aranda Rule," 63 C.2d 518, has been extensively covered by petitioner in his Petition for a Writ of Certiorari, and will not be repeated. It is to be noted that the California Courts (as did the Second Appellate District Court of Appeals in petitioner's appeal) apply the State "Harmless Error Rule" found in *People* v. *Watson* (1956), 46 C.2d 818, 836, 299 P.2d 243 to the Aranda error. Petitioner asserts that application of the State Harmless error rule is clearly erroneous to this error of constitutional magnitude.

The Court of Appeals of New York considered the matter in 1940 in *People* v. *Feolo,* 282 N.Y. 276. The court stated at 281:

"We may even suppose that no fair mind could read Funicello's testimony and Summerfeld's confessions conjointly and have left in it any reasonable doubt of the guilt of the four defendants. But it is not for us to adjudge guilt in any case; that is for the jury. The question for us on this record is whether substantial injustice was done to Feolo, Mastrone and Brabson by denial of their motions for separate trials.

When defendants are jointly indicted, the question whether there should be separate trials is addressed primarily to the practical good judgment of a trial judge. In

the ordinary case, a ruling directing a joint trial will be on the safe side, though confessions or admissions made by one defendant will not be binding on another. (See *People* v. *Doran*, 246 N.Y. 409; *People* v. *Snyder*, 246 N.Y. 491.) The point at which discretion ends and severance becomes a duty is at times hard to fix. (*People* v. *Fisher*, 249 N.Y. 419.) Here the duty to sever was clear before this trial began, though that is not a controlling consideration now. In *People* v. *Fisher* (*supra*) we said: "A retrospective view by an appellate court may reveal injustice or impairment of substantial rights unseen at the beginning. In a case where, without the existence of a confession by one defendant, the evidence against another would be too weak to justify a conviction or even where a conviction would be doubtful, our review of the judgment would compel us to conclude that an abuse of discretion had been committed. One who made no confession must be found guilty, if at all, only on proof independent of a confession by a codefendant" (pp. 427-428). To us it is here plain that without the confessions of Summerfeld, conviction of the other three defendants would have been far from a certainty. On this record, we cannot say, "Cast out the confessions and the result would need to be the same." (*People* v. *Fisher*, *supra*, p. 426.) Whether Funicello was an accomplice was a question for the jury on any test of that status. His story of antecedent association with Feolo did not go wholly uncontradicted.

True, the jury was charged that Summerfeld's confessions were not valid evidence of the guilt of any of his three codefendants. But the jury was also charged that those confessions were to be considered by them "on the question of whether Funicello was an accomplice or not,

because Summerfeld has testified, at least, he in his statement stated that Funicello was not an accomplice." *This error makes inadmissible any argument that the confessions of Summerfeld could not have been weighed by the jury against Feolo, Mastrone or Brabson.*

As to each of the defendants Feolo, Mastrone and Brabson the judgment of conviction should be reversed and a new trial ordered. As to the defendant Summerfeld, the judgment of conviction should be affirmed."

The Court in the Appellate Division reaffirmed the above case in New York in 1956 in *People* v. *LaRuffa,* 2nd App. Div. Rpts. 2d, 765:

"The People of the State of New York, Respondent, v. Thomas La Ruffa, Appellant.—Appeal from a judgment of the County Court, Kings County, convicting appellant of murder in the second degree, and from intermediate orders, including an order denying a motion for a separate trial and an order denying a motion to set aside the verdict and for a new trial. Over objections by La Ruffa's attorney there were received in evidence statements made by his codefendant Gioiosa, in which Gioiosa attempted to exculpate himself, and accused La Ruffa of the murder of one Sorrentino, the crime of which both Gioiosa and La Ruffa were accused. This evidence was received as against Gioiosa only. La Ruffa, whose motion for a separate trial had been denied and who had made no confession to the authorities, testified in his own behalf, and denied that he had had any connection with the crime. Without the introduction into evidence of these statements made by Gioiosa, and unless they had been considered by the jury as evidence against La Ruffa, it is at least doubtful that the evidence

against La Ruffa would have been sufficient to convince the jury of his guilt beyond a reasonable doubt. While ordinarily the question whether there should be separate trials of defendants, jointly indicted, is addressed to the sound discretion of the Trial Judge, it should have been apparent to the district attorney in this case, at the outset, that a joint trial of Gioiosa and La Ruffa would impair La Ruffa's substantial rights and prevent a fair trial of the case against him. However that may be, it is now apparent, on a reading of the record, that without the so-called confessions by Gioiosa, La Ruffa's conviction would have been far from a certainty, and that the denial of a separate trial to La Ruffa resulted in a substantial injustice to him. (Cf. People v. Feolo, 282 N.Y. 276.) If this were not sufficient, the receipt of the testimony of the witness Marie Cook as to her conversation with Gioiosa was entirely improper, and seriously prejudiced La Ruffa's right to a fair trial. In her testimony as to this conversation, when she and Gioiosa were together in an automobile, and when La Ruffa was not in the automobile or present, the witness Cook stated that Gioiosa, in answer to her question as to who murdered Sorrentino, gave her the name of a certain person who was not in the automobile or present. Although La Ruffa's name was not mentioned and this evidence was purportedly received against Gioiosa only, there could have been no doubt in the minds of the jurors in the light of other testimony received, that the name mentioned by Gioiosa to the witness Cook was that of La Ruffa, and it is difficult to understand the purpose of the introduction of this evidence, if it was not to get before the jury this hearsay evidence as to La Ruffa's guilt. That purpose is further indicated in the summation of the

assistant district attorney, in which he referred to this testimony by the witness Cook, as evidence that Gioiosa had said to Cook "La Ruffa killed him." Under the circumstances, we are unable to say that the errors complained of did not violate La Ruffa's sub. rights, or that they may be disregarded under Section 542 of Code of Criminal Procedure. Judgment Reversed, New trial ordered."

Here, apparently, the New York Court did, however, consider a harmless error rule. Likewise, the Federal Courts have considered the problem, in addition to the *Delli Paoli* case, 352 U.S. 232.

In *United States* v. *Haupt*, 136 F.2d 661, the Court stated:

[15] The crux of the attack upon the alleged unfairness of the trial revolves in the main around the court's denial of defendant's motion for severance. It is earnestly insisted that it was impossible under the circumstances for the individual defendants in a joint trial to obtain a fair and impartial hearing. We are mindful, of course, of the well-established rule that the matter of severance is one within the discretion of the trial court and ordinarily not subject to review. This discretion, however, like any other vested in the trial court is, if abused, subject to review and correction. The main argument as to the alleged unfairness of a joint trial has to do with the prejudicial effect of certain evidence offered by the government.

[16] We shall briefly refer to some of the more compelling grounds upon which we think defendants' contention must be sustained. As already shown, there were introduced in evidence fourteen statements, the length of which it is difficult to describe. Some idea is obtained, however, from the fact that they comprise seventy-three

pages (fifty-seven typewritten pages and sixteen handwritten), and that some three hours' time (so stated in oral argument) was consumed in reading them to the jury. As there is no dispute but that such statements, or at any rate most of them, were of a highly incriminating nature, no purpose could be served in relating their contents. They were not only incriminating as to the defendant by whom made, but in the main equally incriminating against other defendants. True, as the government asserts, such statements were offered in evidence only against the defendant by whom made, and the court instructed the jury accordingly. A reading of these statements, however, leaves no room for doubt but that they were damaging not only as to the defendants against whom offered but as to all others. *We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any court, could perform such a herculean feat.*

The holding of the Supreme Court in *Anderson* v. *United States,* heretofore discussed in support of our conclusion that the statements were improperly admitted, is also pertinent to the instant discussion. In that case there were eight defendants, some of whom had made confessions and some not. It was held, for the reasons heretofore stated, that the confessions were improperly admitted. The government contended, however, that even so the convictions should not be reversed as to those defendants, against whom no confessions were admitted. The court said [318 U.S. 350, 63 S.Ct. 602, 87 L.Ed. —]: "The incriminating statement of each petitioner implicated all the others, including those who did not confess. To be sure the trial

court devised a procedure under which the confessions were introduced without mention of the names of the other persons implicated. But their names were in fact revealed in the course of the cross-examination of the confessing petitioners."

The confessions, as here, were admitted only against the persons who made them. The court, in denying the government's contention that the judgment should be affirmed as to the defendants against whom no confessions were admitted, stated: "There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others. *Since it was error to admit these confessions, we see no escape from the conclusion that the convictions of all the petitioners must be set aside.*"

If confessions erroneously admitted as to some defendants require reversal as to others against whom no confessions were admitted, it would seem equally plausible that the statements in the instant case, admitted as to certain defendants but incriminating as to all, would produce the same result. *Moreover, one of the defendants in the instant case made no statement, or, if so, it was not introduced, and as to that defendant the situation is precisely the same as in the Anderson case.* We are unaware of any procedure which the trial court could have devised, other than a severance, by which these incriminating statements could have been introduced against the defendants making them, without seriously prejudicing the rights of other defendants.

We refer to another line of testimony admitted against individual defendants but which must have been damaging to all. It is labeled in the government's brief as "background of defendants." This testimony was admitted, so it is asserted, for the purpose of showing treasonable intent or the state of the defendant's mind. It covered an extremely wide field. In fact, as to some of the defendants, it reads as though they were on trial for the sins of a lifetime. We think much of it had no relevancy to the crime of treason. We are not now, however, considering or deciding its relevancy but its effect upon defendants other than those against whom it was admitted. . . .

Here again, this background testimony as to each defendant was offered only as to that particular defendant and the jury was instructed that it was to be only so considered. We seriously doubt, however, if it was possible for the jury to limit its damaging effect to the particular defendant against whom it was admitted.

[17] Inasmuch as these judgments are to be reversed, there is no occasion to relate the evidence with a view of ascertaining its sufficiency to sustain the judgments. A study of the record, however, is convincing that it is not sufficient as to one and perhaps more of the defendants. This is so, even though it be assumed that the incriminating statements were properly admitted. We express this opinion in connection with our conviction that the guilt of individual defendants was not determined merely on evidence properly applicable to such defendant. *If we indulge in the rather violent assumption that the verdict of guilty as to all defendants was not produced by passion and prejudice, it must have been the result of the inability of the jury to segregate from the mass of evidence introduced that rele-*

vant to individual defendants and properly limit it thereto. Such was the inevitable result, under the circumstances of this case, of a joint trial.

The motion for severance filed by each of the defendants called the court's attention to the fact that all of the defendants were charged in the indictment as principals in the crime of treason, which indictment specified forty-one different overt acts, many of them alleged to have been committed by some one or more of the defendants but not all; that the introduction of evidence in a joint trial relating to said overt acts not alleged to have been participated in by all defendants might lead to confusion and prejudice as to those who had not participated in the said overt acts.

At the time the court ruled upon said motions, there was nothing before the court, as far as the record discloses, except the motions for severance and the indictment. The court's action and the exercise of its discretion are to be judged by the circumstances and facts thus presented. While a consideration of a motion for severance where several persons are charged jointly with the commission of the grave crime of treason and numerous overt acts are alleged to which some of the defendants were not parties, must challenge the trial court to the utmost care and caution, we cannot say that the court abused its discretion in overruling such motion.

However, after the trial and all of the evidence as to the so-called background of certain defendants had been heard and the fourteen incriminating statements admitted and the overt acts had been considered, the defendants, by motion for new trial, again appealed to the trial court's discretion to relieve them of the unfair and prejudicial consequences

of a joint trial. Then the court had to consider the task of the jury, which had to keep separated in its mind the involvement of the various defendants in the numerous overt acts, to eliminate from the incriminating statements those parts which involved defendants other than the one against whom such statement was admitted, and to consider only as to such defendant the acts and utterances comprising the so-called background testimony as it related to such defendant. We think that if these facts had been known to the trial court at the time the motion for severance was made, it would have been an abuse of discretion for the trial court to have refused a severance. When presented again in the motion for a new trial when all of these facts and circumstances were known to the court, it was likewise an abuse of discretion to overrule such motion and thus refuse to remedy this prejudicial procedure."

This Honorable Court's attention is directed to the fact that the Circuit Court of Appeal *did not* consider a Federal Harmless Error Rule, but reversed when it realized the facts of the multitude of cross-incriminating statements totalling some 73 pages in length.

As another example, the 5th Circuit Court of Appeals refused to consider whether there was sufficient other evidence to link appellant Devenny to the crime after co-defendant Schaffer's confession was used in their joint trial. That confession implicated Devenny and the jury was "properly" instructed to consider the confession as evidence against Schaffer alone.

Citing with approval *United States v. Haupt*, 136 F.2d 661, 672, the 5th Circuit did not bother to indulge in the use of the Federal "Harmless error" rule.

The Court said, at 18 of 221 F.2d 17:

[1, 2] Devenny moved that he be given a separate trial and supported such motion by affidavit of his counsel, "that the trial of this cause will be the third trial of this matter, the two previous trials having resulted in deadlocked juries. In neither trial of this case has a confession been introduced against defendant, Devenny. In the last trial of this case, a confession made by defendant Schaffer, admitting the offense and implicating defendant, Devenny, was admitted in evidence. This was extremely prejudicial to defendant, James H. Devenny. Defendant, James H. Devenny, has made a statement to authorities but did not admit in it that he committed an offense. Devenny's statement was not used in either of the previous trials and it will be extremely prejudicial to defendant, James H. Devenny, to force him to trial with defendant, Schaffer, who has made a confession which implicates defendant, Devenny."

Devenny's motion for severance was denied and the defendants were tried jointly. The granting or refusing of a severance is within the trial court's discretion and not subject to review or correction unless that discretion is abused. What constitutes abuse of discretion necessarily depends upon the facts in each particular case. *Brady* v. *United States*, 8 Cir., 39 F.2d 312, 313. Under the circumstances of an earlier case, this Circuit held that refusing a severance was not an abuse of discretion, even though the movant's co-defendant had confessed implicating the movant. *Raarup* v. *United States*, 5 Cir., 23 F.2d 547. See, also, *Johnson* v. *United States*, 6 Cir., 82 F.2d 500; *Maxey* v. *United States*, 30 App. D.C. 63; *United States* v. *Fradkin*, 2 Cir., 81 F.2d 56; *Hall* v. *United States*, 83 U.S. App.D.C. 166, 168 F.2d 161, 4 A.L.R.2d 1193; cf. *Dauer* v. *United States*, 10 Cir., 189 F.2d 343, 344.

A careful study of the record in this case, however, leads us to the conclusion that the motion for severance should have been granted. Devenny and Schaffer were together throughout the transaction; both were present on every pertinent occasion. Schaffer's confession implicated Devenny and, while the trial judge eliminated from the confession the statement that "I think that Devenny knew the property was stolen," other parts of the confession clearly prejudiced Devenny in the eyes of the jury. *The court, of course, properly instructed the jury to consider the confession as evidence against Schaffer alone, and to disregard it as evidence against Devenny.*

We believe, however, that the two defendants were so inseparably connected that the jury could hardly have been expected to return a verdict of guilty against one and of not guilty as to the other. There being only two defendants, it would not be very time consuming but entirely practicable to accord them separate trials. *Like the Seventh Circuit in the case of United States v. Haupt, 136 F. 2d 661, 672, "We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted." We hold, therefore, that the court erred in denying the appellant Devenny a separate trial."*

The Supreme Court of California, speaking through Justice Raymond E. Peters stated in *People* v. *Clark*, 62 C.2d 870, 885:

"Some authorities in this field feel that a denial of a motion to sever amounts to a denial of due process whenever joint trial will require a jury to determine both the

voluntary nature and truth of an extrajudicial statement which incriminates both the maker and his codefendant. The reasoning is that the jury, even though instructed that an extrajudicial statement is not to be considered against any defendant save he who made it, cannot put out of mind its determination of the truth of that statement in all of its details. Hence, it unconsciously accepts the truth of the hearsay.

In Jackson v. Denno, 378 U.S. 368 [84 S.Ct. 1774, 12 L.Ed.2d 908], the United States Supreme Court held that a jury is ordinarily incapable of separating the issue of voluntariness of an extrajudicial statement from the issue of its truth, and that due process requires that the trial judge determine the first issue. If defendants are to be tried under circumstances wherein their several extrajudicial statements incriminate the others, even more is required of the jury than under the situation involved in Jackson. In such case, the jury is expected to forget that it found the statement containing the hearsay incrimination to be true. As said in People v. Chambers, 231 Cal. App.2d 23, 33 [41 Cal.Rptr. 551] "Thoughtful judicial opinions have voiced misgivings as to jurors' ability to segregate evidence into separate intellectual boxes, each containing a single defendant. (People v. Biehler, supra, 198 Cal.App.2d at p. 298 [17 Cal.Rptr. 862]; see also United States v. Haupt, 136 F.2d 661, 673-674.) Unconscious motivations . . . slip into the processes of conscious mentation unseen, unfelt and usually unacknowledged . . . [J]udicial cliches carving jurors' minds into autonomous segments may waver and fail."

In Jackson, supra, the court quoted with approval from Morgan, Some Problems of Proof under the Anglo-Ameri-

can System of Litigation (1956) pages 104-105, where the author says, referring to the issue of voluntariness, "'regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it . . . [T]he rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed.'" If this be so, how can that juror be uninfluenced by that portion of the confession which incriminates a codefendant? If he finds the confession to be true, does he find it true only in those matters wherein the codefendant plays no part? Can he find that the confession is true insofar as it admits that A committed certain acts in concert with B, and not at the same time believe that B committed those same acts in concert with A? By finding the confession to be true, has he not convicted the codefendant without benefit of other evidence? The incongruity of any rule which assumes that this dilemma may be cured by instructions is discussed in a comment in 78 Harvard Law Review 211, at page 213. It has been argued that a proper rule would either (1) require severance of trials when such extrajudicial statements are to be used, (2) make such statements inadmissible when the prosecution insists on joint trial, or (3) allow joint trial and use of extrajudicial statements only after the trial judge has deleted therefrom all reference to any codefendant."

Again, no mention is made that the Court should indulge in the use of a "harmless error" rule.

In finality, petitioner Glenn Martin Harrington asserts that numerous State and Federal tribunals have already

devoted intense thought to this major issue, and have come to the conclusion that this is constitutional error of the highest order. In addition, it is once again asserted that the combined effects of *Brookhart* v. *Janis*, per Justice Hugo L. Black, and *Bruton* v. *United States*, per Justice William Brennan have at this time already decided that the instant error may not be obviated by recourse to any "Harmless Error" Rule.

Petitioner Glenn Martin Harrington's conviction should be reversed and he be awarded a new trial free of the manifold constitutional infirmities which permeated the initial proceeding.

This Honorable Court should declare that this Constitutional error of the first magnitude shall not be subjected to any harmless error analysis.

II.

The Rulings of This Honorable Supreme Court of the United States in George William Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, Decided May 20, 1968 and Roberts v. Russell, 392 U.S. 293, 20 L.Ed.2d 1100, 88 S.Ct. 1921, Should Require This Honorable Court to Reverse Petitioner's Conviction.

Petitioner contends, and respondent State of California has already admitted, acknowledged, and conceded in its Brief in Opposition to the Writ of Certiorari, that the rulings of this Honorable Supreme Court of the United States in *Bruton* v. *United States* and *Roberts* v. *Russell*, cited *supra*, answer favorably to petitioner Glenn Martin Harrington the questions and issues on appeal set forth in the original petition for certiorari, namely:

1. Does the joint trial of codefendants in a criminal proceeding before a jury composed of lay citizens where confessions of codefendants implicating this petitioner are introduced in evidence and where said codefendants do not take the witness stand for cross examination purposes violate the confrontation clause of the 6th Amendment and the due process clause of the 14th Amendment to the United States Constitution?

2. Does the process of instructing that lay jury that they are to consider the confessions only as evidence against the confessor and not as evidence against the implicated party sufficiently guarantee due process of law under the 14th Amendment to the party implicated in view of this Honorable Court's ruling in *Jackson* v. *Denno* (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774?

3. Is the doctrine of *Delli Paoli* v. *United States* (1957), 352 U.S. 232, 1 L.Ed.2d 278, 77 S.Ct. 294 still valid law in view of the combined effect of the decisions of this Honorable Court in *Jackson* v. *Denno* (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774, *Turner* v. *Louisiana* (1965), 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546, *Pointer* v. *Texas* (1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065, *Douglas* v. *Alabama* (1965), 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074 and *Brookhart* v. *Janis* (1966), 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245?

4. Does not the combined effects of the above cited cases in question 3, interpreting the 6th and 14th Amendments, require, as a protection of a specific constitutional right, that procedures as set forth by the Supreme Court of the State of California in *People*

v. *Aranda, et al.* (1965), 63 Cal.2d 518 be now regarded as the law of the land?

6. Does not the denial of a motion to sever the moving party's trial from that of his codefendant amount to a denial of due process of law whenever said joint trial will require the jury to determine both the voluntary nature and truth of an extrajudicial statement which incriminates both the maker and his codefendant?

These issues have been repeated for the benefit of the Court to emphasize the acknowledgement given by the State of California and its Attorney General Thomas C. Lynch that they have already been resolved in the favor of this petitioner. See Respondent's Brief in opposition to Writ of Certiorari, Page 7.

In *Bruton*, this Court stated the following significant facts:

1. At 20 L.Ed.2d 476, 478, Justice Brennan states:

"This case presents the question, last considered in Delli Paoli v. United States, 352 U.S. 232, 1 L.Ed.2d 278, 77 S.Ct. 294, whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence."

2. At 20 L.Ed.2d 476, 479, Justice Brennan continues:

"We granted certiorari to reconsider Delli Paoli. 389 U.S. 818, 19 L.Ed.2d 70, 88 S.Ct. 126. The Solicitor General has since submitted a memorandum stating that "in light of the record in this particular case and in the interests of justice, the judgment below

should be reversed and the cause remanded for a new trial." The Solicitor General states that this disposition is urged in part because "[h]ere it has been determined that the confession was wrongly admitted against [Evans] and his conviction has been reversed, leading to a new trial at which he was acquitted. To argue, in this situation, that [petitioner's] conviction should nevertheless stand may be to place too great a strain upon the [Delli Paoli] rule—at least, where, as here, the other evidence against [petitioner] is not strong." We have concluded, however, that Delli Paoli should be overruled. We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule Delli Paoli and reverse.

3. At Page 479, the basic premise of *Delli Paoli* was explained, and reasons given for its repudiation:

"[2] The basic premise of Delli Paoli was that it is "reasonably possible for the jury to follow" sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime. 352 U.S. at 239, 1 L.Ed.2d at 284. If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor. But since Delli Paoli was decided this Court has effectively

repudiated its basic premise. Before discussing this, we pause to observe that in Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065, we confirmed "that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him" secured by the Sixth Amendment, id. at 404, 13 L.Ed.2d at 926; "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." Id. at 406-407, 13 L.Ed.2d at 927, 928."

4. At Page 484, the fact is emphasized that the jury cannot restrict its thinking to only the confessing defendant, but logically allows the implicated codefendant to be prejudiced; the Court stated:

"[6, 7] Finally, the reason advanced by the majority in Delli Paoli was to tie the result to maintenance of the jury system. "Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." 352 U.S. at 242, 1 L.Ed.2d at 285. We agree that there are many circumstances in which this reliance is justified. Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. "A defendant is entitled to a fair trial but not a perfect one." Lutwak v. United States, 344 U.S. 604, 619, 97 L.Ed. 593, 604, 73 S.Ct. 481; see Hopt v. Utah, 120 U.S. 430, 438, 30 L.Ed. 708, 711,

7 S.Ct. 614; cf. Fed. Rule Crim. Proc. 52(a). It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in Jackson v. Denno, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare Hopt v. Utah, supra; Throckmorton v. Holt, 180 U.S. 552, 567, 45 L.Ed. 663, 671, 21 S.Ct. 474; Mora v. United States, 190 F2d 749; Holt v. United States, 94 F2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation was directed. Pointer v. Texas, supra."

5. At 485, the final paragraph sums up the error as "a hazard that this court can not ignore"; the court stated:

"We, of course, acknowledge the impossibility of determining whether in fact the jury did or did not ignore Evans' statement inculpating petitioner in de-

termining petitioner's guilt. But that was also true in the analogous situation in Jackson v. Denno, and was not regarded as militating against striking down the New York procedure there involved. It was enough that that procedure posed "substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore." 378 U.S., at 389, 12 L.Ed.2d at 922, 1 ALR3d 1205. Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, *in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.* See Anderson v. United States, 318 U.S. 350, 356-357, 87 L.Ed. 829, 833, 63 S.Ct. 599; cf. Burgette v. Texas, 389 U.S. 109, 115, 19 L.Ed.2d 319, 325, 88 S.Ct. 258. Reversed."

It is to be noted that in the State of California, the Supreme Court of California, speaking through the learned Associate Justice Mathew Tobriner has decreed that even *judges* cannot compartmentalize their minds to obviate this error.

As petitioner stated in his Petition for a Writ of Certiorari,

"It is to be noted as well that the Supreme Court of California in deciding its original *Aranda* Rule, ap-

parently applied it to a *jury trial only.* Perhaps then with great soul searching, and with perhaps an admission of inability of its own learned trial judges in the Superior Courts of its 58 Counties to disregard the implicating confession as to the non-confessor, the California Supreme Court again through the majority opinion of the learned Justice Tobriner decided the two cases of *People of the State of California* v. *John Charles, Jr. and Oliver Martin Boddie* (1967), 66 Cal. 2d 330, and *People of the State of California* v. *Robert Lee Massie and John Robert Vetter,* June 21, 1967, 66 Cal.2d 899.

In overturning the conviction for first degree murder of John Robert Vetter, Justice Tobriner stated at 916 of 66 Cal.2d 899:

> "Older cases had held almost unanimously that a court could never abuse its discretion in denying a motion for a separate trial because the jury could be admonished not to consider prejudicial testimony admissible only against a codefendant. The more recent cases, however, recognizing the impossibility of a juror's obliteration from his mind of that which he already knew, have held that the court should separate the trials of codefendants in the face of an incriminating confession, ..."

In *People* v. *Massie and Vetter,* the Superior Court of Los Angeles County tried together before Judge H. Burton Noble of Pasadena Robert L. Massie and John R. Vetter, no jury. Robert Massie confessed his crime of robbery and first degree murder of one Mildred Weiss, implicating John Vetter as the driver of the getaway car used in the

crime. Robert Massie did not take the stand for cross-examination after his confession was played via tape recorder and testified to by police witnesses from the stand to the Honorable H. Burton Noble, Judge. John Vetter emphatically denied his guilt from the stand. Both were convicted of first degree murder. Subsequently, Robert Massie made extrajudicial statements exonerating John Vetter as the driver of the get-away car.

On June 21, 1967 the Supreme Court of California reversed Vetter's conviction under the *Aranda* Rule, *People* v. *Aranda* (1965), 63 Cal.2d 518, per Justice Tobriner, at 66 Cal.2d 899.

On November 4, 1967, by jury trial, John Vetter was acquitted in Los Angeles County Superior Court of First Degree Murder, in an ordered retrial.

Realistically, the California Supreme Court has recognized that *experienced trial judges in its own Superior Courts* experience difficulty in disregarding an implicating confession as to its affect on the implicated codefendant.

It is to be noted that dissenting Associate Justices Louis Burke, Stanley Mosk, and Marshall McComb of the California Supreme Court recognized this problem, but kept the faith that the trial level judges could generate the required discernment; at 924 of 66 Cal.2d 899, *People* v. *Massie and Vetter,* Associate Justice Burke states:

> "This was a non-jury case tried by an experienced trial judge who *presumably* (emphasis mine) was able to exclude from his consideration in determining Vetter's guilt evidence admitted solely against Massie (Massie's confession implicating Vetter) and to determine Vetter's guilt on the basis of the evidence rather

than suspicions arising from Vetter's association with Massie. Although at a separate trial Vetter might have obtained exonerating testimony of Massie (Vetter did; California Governor Ronald Reagan stayed Massie's scheduled execution in San Quentin's gas chamber so he could be a witness at Vetter's retrial, and Massie exonerated Vetter) it is likewise possible that Vetter would not have called Massie as a witness or that Massie, if called, would not have given exonerating testimony. Even had Massie been called and given such testimony he could have been impeached by his extrajudicial statements accusing Vetter of being the driver of the get-away car. In my opinion it is not reasonably proper that a result more favorable to Vetter would have been reached in the absence of the asserted errors, and I would affirm the judgments as to Vetter as well as to Massie."

It is hereby submitted that the above case is exemplary authority for the constitutional violation of the confrontation clause of the Sixth Amendment and its prejudicial result; trying Vetter with Massie, introducing into evidence Massie's implicating confession of Vetter (with agreement by the trial judge that he was going to consider the confession only against Massie) and Massie not taking the witness stand for cross-examination purposes was as surely a violation of the Sixth Amendment's confrontation clause as if Massie would have taken the stand and the Court had refused cross-examination. The California Supreme Court recognized the inability of the trial judge to restrict his thinking.

As this Honorable Court is well aware, the doctrine of *Bruton* was made both applicable to the states and totally

retroactive in *Roberts* v. *Russell*, 392 U.S. 293, 20 L.Ed.2d 1100, 88 S.Ct. 1921.

At 1102 of 20 L.Ed.2d 1100, the per curiam decision states:

> "Per Curiam.
>
> In Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620, decided May 20, 1968, we overruled Delli Paoli v. United States, 352 U.S. 232, 1 L.Ed.2d 278, 77 S.Ct. 294, and held that, despite instructions to the jury to disregard the implicating statements in determining the codefendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violated the codefendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. This case presents the question whether Bruton is to be applied retroactively. We hold that it is."

The decision continues:

> "[1] Although Bruton involved a federal prosecution and this is a State prosecution, the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is made applicable to the States by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065; Douglas v. Alabama, 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074."

The mandates of *Bruton* are reemphasized:

> "Despite the cautionary instruction, the admission of a defendant's confession which implicates a codefendant results in such a "serious flaw." The retroactivity of the holding in Bruton is therefore required; the error

"went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination" of his guilt or innocence. Linkletter v. Walker, supra, at 639, n. 20, 14 L.Ed.2d at 614. As we said in Bruton:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial." 391 U.S., at —, 20 L.Ed.2d at 485."

Again it is asserted that the combined effects of *Bruton*, *Roberts*, and *Brookhart* v. *Janis*, 384 U.S. 1, would seem to require a reversal of the instant conviction without further consideration. However, as petitioner acknowledges the issue of whether the error may be saved in a given case by recourse to a harmless error rule was not *explicitly* settled in *Bruton* or *Russell*; petitioner asserts in finality that the combined effects of *Brookhart* v. *Janis*, *Bruton* v. *United States*, and *Roberts* v. *Russell* do *implicitly* settle the issue, commanding that recourse to the harmless error rule will not be tolerated, and the judgment must be reversed.

III.

Should This Honorable Court Feel Constrained to Apply a "Harmless Error Rule" to the Facts of This Case, the Appropriate Rule Must Be the Federal Harmless Error Rule, as Enunciated in Chapman & Teale v. California (1967), 386 U.S. 18, 23, 17 L.Ed.2d 705, 87 S.Ct. 824, viz.: "The Prosecution Must Prove Beyond a Reasonable Doubt That the Error Complained of Did Not Contribute to the Verdict Obtained"; When Said Rule Is Applied to the Facts of the Instant Case It Cannot Be Said That, Beyond a Reasonable Doubt, the Error Complained of Did Not Contribute to the Verdict Obtained.

As this Honorable Court correctly set forth in a footnote to *Chapman* v. *California*, 386 US 18, 17 L.Ed.2d 705, 710, the California statutory harmless error rule provides that "after hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." See also *People* v. *Watson*, 46 C.2d 818.

At Page 710 of 17 L.Ed.2d 705, this Honorable Court stated:

> "[6, 7] The federal rule emphasized "substantial rights" as do most others. The California constitutional rule emphasizes "a miscarriage of justice," but the California courts have neutralized this to some extent by emphasis, and perhaps over-emphasis, upon the court's view of "overwhelming evidence." We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. Connecticut, 375 US 85, 11 L.ed.2d 171, 84 S.Ct. 229. There we

said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id., at 86, 11 L.ed. 2d at 173. *Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless.* Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in Fahy v. Connecticut about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can

be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our Fahy case."

This Court's language above bears repeating:

"Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention *not to treat as harmless those constitutional errors that "affect substantial rights" of a party.*"

It goes without saying that violations of *Bruton* v. *United States*, *Roberts* v. *Russell*, and *Brookhart v. Janis* occurred. It further goes without saying that in the three cases cited immediately *supra*, "constitutional errors of the first order of magnitude occurred," and it is therefore asserted without fear of contradiction that those errors "cannot be treated as harmless because they affect substantial rights of the party, Glenn Martin Harrington."

The rights, of course, are the right to confront all witnesses who testify against him, which right was deprived in the use of the incriminating confessions of codefendants Gilbert Cooper and Jesse Bosby by the People during the trial.

The magnitude of the error might be noted merely by comparing the number of pages of trial transcript devoted to the reading of the confessions of George Rhone, Gilbert Cooper, and Jesse Bosby to the jury.

The prosecution placed on the witness stand Los Angeles police officer Charles William Vaughn. At Page 304 of the trial transcript (Page 198 of the Single Appendix) the reading of the confession of Gilbert Cooper begins. It continues to Page 332, trial transcript, where a recess was taken. In the interim, an in-chambers discussion was held between counsel and the court during which petitioner Harrington's counsel objected to the procedure of attempting to mask the identity of the names mentioned by Cooper during his confession. The discussion in-chambers begins at Page 333 of the transcript (Page 215 of the Single Appendix). And, after heated discussion between counsel, the court, and police officer Charles William Vaughn, culminated in the following very significant colloquy; see below. Petitioner sets forth verbatim the in-chambers conversation between the trial judge, counsel, and the police officer who was to testify and read verbatim the altered confessions. The purpose is manifold:

a. to illustrate the fact that the court was quite aware of the error and prejudicial results;

b. to illustrate the impossibility of ever altering in a meaningful way these confessions;

c. to illustrate the tremendous effort made to alter the confessions, all of which was abandoned when the result became ridiculous.

Humorously, almost, the police officer expressed concern that the jury might infer that he was a poor policeman

because he failed to obtain the names of any of the people he arrested and interviewed!!! (Page 365, R.T.)

The conversation, beginning line 25, Page 363 (Single Appendix, Page 234) through line 11, Page 377 is herewith reproduced:

"The Court: I want to thank you officially, Mr. Rosen, for your help and cooperation. As I say, I read the transcript last night, but I didn't make as meticulous notes as you did and I appreciate your efforts.

Mr. Warnberg: We have just one problem: My officer now is testifying to a revised statement and he is just a little perplexed, and in a way, he probably could be because he is not now reciting or giving a statement as it was actually given.

The Court: Well, he is not committing perjury because we have directed him to do it.

Mr. Rosen: I think what he can say, "In substance here are the questions and answers," using the words "in substance," because that is what he is relating, is the substance of it, not the exact language of it.

Mr. Warnberg: Does it put any reflection on him?

The Court: How can it put a reflection on him when the Court has ordered him to do it?

Mr. Warnberg: Well, could—

The Court: He can't answer to the jury and say, "This isn't an exact statement but this is what I have been told to do," because then we are not going to accomplish our purpose. He is not going to do anything wrong.

Mr. Warnberg: Actually, I think my statement to him was, "Does the statement fairly reflect the conversation?" And it does fairly reflect it, doesn't it?

The Court: I think so.

Mr. Rosen: Sure.

Witness Vaughn: I don't. 40 per cent of it is out.

The Court: Sergeant, I know how you feel. I went over this with you yesterday and I explained it to you yesterday. I don't want to go over it again.

Witness Vaughn: I don't want to be facetious—

The Court: You are not being facetious, you are being argumentative, and you have a right to your point of view and I sympathize with your point of view; but, you have got a job to do and I have got a job to do. Whether you like the way I am doing my job or not is quite immaterial.

Witness Vaughn: I just wanted it clarified, your Honor.

The Court: Clarify what?

Witness Vaughn: I don't think that I am committing perjury or anything like that, but in response to Mr. Warnberg's question, "Is this the substance of your conversation?"—in essence, "No, sir, it isn't."

Now, how do we clarify that with the jury? I am sitting here testifying—

The Court: The jury is not going to see this statement.

Witness Vaughn: I realize that, sir, but they will ask, "You mean this officer didn't ask any names? This officer didn't ask any addresses? This officer didn't ask descriptions of anybody?"

The Court: Well, they might conjecture about it, sir, but none of these lawyers are going to cross examine you and ask you whether you asked them about names. So, it is never going to come out.

You are not on trial as being a good investigator or a poor investigator.

Mr. Gordon: Your Honor, say one of the lawyers should take out in addition to ask if he asked any names, would you stop him?

The Court: No, I am not going to stop him. I will then let the officer testify about all the rest of the conversation that we have stricken here.

If any lawyer gets out of line to that extent, I would let him testify to all, because I think it would be extremely bad faith for any lawyer to question him on that basis now.

Mr. Warnberg: As I understand it now, we have no argument as to probable cause for arrest; we will go right into it and use the statements?

Mr. Gordon: It is nice to get these things clarified before.

The Court: I think certainly I wouldn't have taken all this time to do that if you are going to start cross examining the officer. I will tell you, I will go this far with you: I will cite anyone for misconduct who argues to the jury that this officer, he may not have given you all the statements or he didn't even ask the names, so if he didn't ask the names of the other people involved or some such reflection upon his ability to investigate and that he let something out or that his memory is poor because of that, I am going to cite you for misconduct because you are going to intimate to the jury that perhaps he doesn't know what he is doing or that his memory is bad because of the fact that he didn't do certain things.

It is only a reflection on you, because we have gone through these deletions.

Now, if that is what you want to do, tell me now and I will leave these statements in verbatim.

Mr. Gordon: Well, I think we should get a statement from the lawyers.

The Court: All right. I want to know what you're going to do. I'm warning you now, because, frankly, partially because of Mr. Walton's statement yesterday about this investigating officer. I don't know what you're going to do, after a situation like that.

I don't want that to happen again, or anything like it.

So I'll tell you now that if you intend to have any such argument, or if you intend to have any such cross examination to that effect, let me know now and all of this time will have been wasted, because I'm going to let him give the conversation as it actually took place with all the names less these deletions.

Anybody have anything to say?

Mr. Gordon: Shall we have a stipulation on it so that we know now how we—because some of the men have opposed these corrections, and I would like to know what my position is with my client before we go out and start our hearing.

I would just kind of like to know what the position of these fellows is.

Mr. Walton: Well, I think I made my position known on the objections.

Largely here in the Bosby statement, we have a statement which is not, in essence, terribly incriminating against Harrington as it was originally given. He didn't even know Harrington's name.

Now, with the ambiguities, it becomes potentially very incriminating. That is why I made that objection.

The Court: I think you were the one that started this off, Mr. Walton, by saying, "Judge, I want you to take the time to go in there and edit it—"

Mr. Walton: Listen, Judge, I don't propose to cross examine at all. I have made the objections for the reasons which I have stated, and you have ruled, and I propose to leave it at that as far as these statements go.

The Court: Well, are you telling the Court that the Court has done something that makes it even worse for your client? Is that what you are telling the Court?

Mr. Walton: I made the objection—

The Court: No, answer my question directly. Are you telling this Court that what the Court has done by these deletions is make it look worse for your client than if the deletions had not been made?

Mr. Walton: I can't answer that question.

The Court: Oh, yes, you can, because you made the statement.

Mr. Walton: Your Honor—

The Court: Do you read back what he said, Mr. Reporter? And you listen to what you said, Mr. Walton.

(Record read.)

The Court: That is exactly it. In other words, you are telling me that I have made it worse for your client by the deletions and the changes?

Mr. Walton: I made specific objections to specific deletions, and your Honor overruled them, and I'm just willing to stand on that.

The Court: I'm sorry, Mr. Walton, you're not being truthful with this Court. He just read back your statement that you said. Doesn't that mean that I have made it worse?

I have other lawyers here. I ask you gentlemen, what does he mean by the statement?

Mr. Walton: Well, when your Honor says you made it worse, I am not directing any criticism at your Honor. I appreciate the fact that you have taken two or three hours to go through these statements in this way, because I feel what your Honor is doing is trying to correct a rather unfortunate situation, in that these statements are so vastly incriminating against one or more of the other defendants.

And then a Judge who will take the time in chambers to do this has my admiration. So I'm not being critical of your Honor, and your Honor is inviting me to be critical.

The Court: I am not. I am only reading your statement, which says that the ambiguities have now made it more incriminating for your client. That means to me that what I have done is made it worse for your client.

Now, I'm not talking about personal criticism of me, Mr. Walton. I want to know if what you think what I have done makes it now worse for your client. And if so, I'm going to correct it and change it.

Mr. Walton: When the word "Cooper," say, is stricken from a context of these statements and the phrase, "this other fellow" or "one of the other guys," or something like that is inserted in its place, it leaves the jury to possibly say, "Well, the other guy was Harrington" or "The other guy was Rhone" or "The other guy was Cooper."

They might in total context land on Cooper as being the person to whom Bosby refers.

But that was the basis of objections already made.

The Court: All right, gentlemen, I'm going to change my ruling, if that's the way you feel about it. I have no alternative. You are telling me that I am making it worse for your client, which is, in essence, what you have done. I have no alternative but to leave the statements in as they were made. I don't see how I have any other alternative. You tell me that you are making an objection on that basis.

Any of you other lawyers have any statements to make with respect to this?

Mr. Gordon: Well, it's nice to get a clarification to, at least, what the attitude is.

Now, I'm very sorry that we can't have the clarifications, but—

Mr. Rosen: Well, it was my opinion, Judge, that other than severance, which, of course, would have been most advantageous to all of these defendants, what you have done is of advantage to these defendants by your deletions.

Certainly Harrington is going to suffer by Bosby's statement in its original form more than in its deleted form.

The Court: Sir, that may be true, but that is not what his lawyer has said.

Mr. Rosen: That is my opinion.

The Court: I respect that, and I respect your opinion. That is why I have tried to do what I have done. But when his lawyer is telling me it will make it worse for him and he doesn't want it, then I have no alternative but to do what the lawyer requests, in my opinion, because I'm not trying the case for Mr. Harrington.

Mr. Rosen: I understand that, your Honor.

The Court: Mr. Walton is trying it.

Mr. Moore, do you have any comments, sir?

Mr. Moore: No, sir.

The Court: All right.

Mr. Gordon: Well, your Honor, don't you think—Mr. Moore has expressed himself here some in the past with reference—and I think that we ought to get at least an agreement among the lawyers here before his Honor makes a ruling, whether we want it or don't want it.

I'm for it; I'm for the deletions. Because I certainly think it has helped us tremendously.

Now, what is going to be the conclusion?

The Court: Well, you are apparently for it.

Mr. Rosen: I am.

The Court: And Mr. Moore and Mr. Walton have objected to the changes.

Mr. Gordon: What is your position now, Moore? Do you want the corrections or not?

Mr. Moore: Well, I don't see—you see, I'm trying to represent my client as best I can.

Now, I understand your Honor's position, and I'm not telling you what to do. You make your rulings and you have fairly, I'm sure, in your belief.

I am only saying, starting anew, then, so I'm not misquoted, severance was what we wanted so this problem wouldn't arise.

Now, whether we are right or wrong, severance is denied.

Now, the statements—I say this only—that by striking a word, as I have indicated before, doesn't accomplish anything unless you strike the ultimate end that comes from striking the word.

If you, say, strike the name "Gilbert Cooper cashed a check," you strike the name "Gilbert Cooper" and put in "the other man cashed the check," it's the same as saying "Mr. Cooper."

But I go further and say, as I have, that when they talk—one man here talks that he talked with the other man about robberies, about going in with the check, and one man was there, I think you are building up the conspiracy through one man's statement.

That's all I am saying is, that as long as you let one man talk about conspiracy, not what he did but what other people did, you are adding evidence to the other people's case, even though the Judge instructs the jury that this statement—for example, Mr. Bosby's—is going to be used against Mr. Bosby, I say any reference he has to talking to other people, planning the job with three other men, and all that, can't help but be in the jury's mind that these three other men planned the robbery with Mr. Bosby, and therefore are all guilty of conspiracy to rob.

The Court: All right, gentlemen. I think it is perfectly clear as to what the Court's course of action must be. That is to let the statements in their entirety.

I think it has certainly taught me a lesson—

Mr. Walton: Well, wait a minute.

The Court: We learn every day.

Don't tell me to wait a minute, Mr. Walton. Please don't tell me to wait a minute, sir, when I am speaking. I think that you owe me the courtesy, sir, of allowing me not only to finish but of addressing me properly.

Mr. Walton: I'm sorry. I apologize. Your Honor is correct.

The Court: Without going into that in any further detail, I appreciate the efforts of counsel in trying to arrive at a solution in this case.

I thought I was doing what I considered to be the fair thing. I certainly wanted to do it that way, and I think I tried to do what very few judges have done in the past, trying to make this a fair trial. I see that my efforts have been unsuccessful.

And I will follow the law as it exists today and not try any innovations. I sincerely believe that the motion for severance was properly denied.

I know that these statements are admissible as to the defendant making the statement, and that there is no reason to strike any portion of the statements under the existing law as I understand it.

But I have tried to accomplish something that apparently cannot be accomplished, because of the objections of counsel.

The Court will now rule that the statements may be made in their entirety, with the admonishment to the jury that the statement is admissible only as against the defendant making the statement and for no other purpose as against any other defendant."

The Supreme Court of Illinois in 385 Ill. 554, *People* v. *Serritello,* considered the possibility of blanking out names in confessions, replacing those names with "Blank."

The Court stated:

"The anticipated use of Serritello's confession was the basis of Clow's petition for a separate trial. During the hearing on the petition, the assistant State's Attorney stated they had Serritello's written confes-

sion and expected to introduce it in evidence, that wherever Clow's name appeared it would be deleted and that its use as evidence would be limited to the case against Serritello. Thereupon the court denied Clow's petition for a separate trial.

The general rule is, that those indicted jointly for the commission of a crime are to be tried together. Whether a separate trial should be granted or not is a matter that lies largely within the discretion of the trial court. Such discretion should not be exercised in an arbitrary manner or in such a way as to work an injustice. (People v. Patris, 360 Ill. 596; People v. Sweetin, 325 Ill. 245.) Ordinarily when a motion for a separate trial is made on the ground that a confession by a codefendant implicates the movant, a severance should be ordered unless the State's Attorney declares that the admissions or confessions will not be offered in evidence upon the trial or unless there be eliminated from the confessions any reference to the codefendant applying for a severance. (People v. Fisher, 340 Ill. 216; People v. Sweetin, 325 Ill. 245; People v. Buckminster, 274 Ill. 435.) This practice was followed in this case but under the evidence the deletion of Clow's name from the confession did not remove from the consideration of the jury the prejudicial effect that arises by the implication of a defendant in the confession of a codefendant.

The witnesses who testified on behalf of the People were the owner of the apartment which was burglarized, the police officers who arrested Clow and Serritello in the loop district soon after the burglary and the officer who arrested Clow in April. The foundation

for the introduction of the confession was laid in the testimony of the police officer who made the arrest of Serritello. After testifying to the stopping of the automobile, the taking of Serritello and Clow therefrom and the finding of the stolen articles and the burglar tools in the car, they identified Clow as one that was in the car and in possession of the stolen property. The following, taken from the confession, will serve to illustrate how the deletion of Clow's name from the confession did not disentangle his connection with the stolen articles. In making the confession Serritello was interrogated as to the articles found in his automobile. His answers with Clow's name deleted were: "Well, that blue steel automatic that is laying on the table there, we got that gun in the burglary, and then the little nickel plated gun that is laying along side of it that was Blank's gun, and there there two pair of ladies' stockings that we got in the burglary, they were in the car, too. The fur coat and the radio that we took in the burglary, Blank had sold them to some guy on the North Side before we got arrested, and he gave me $10 for my end." At another place he was asked: "How did Blank and yourself get out of this flat?" His answer was, "We got out through the back door, which we left open." He stated: "I carried the radio and Blank carried the rest of the stuff." He was further interrogated as to the nickel plated revolver found in the automobile and was asked: "Did he [Blank] have that gun on him when you entered this flat last night?" To which he answered: "Yes, he did." At another place he tells of meeting Blank at a street intersection and that Blank got out of the car and took the fur coat and

the radio with him to sell, that after about twenty minutes Blank came back and gave him $10 and "said that he sold the radio and fur coat for twenty bucks."

In the offer of the confession in evidence, the assistant State's Attorney limited its use as evidence to Serritello but the deletion of Clow's name and its restricted use as evidence could not keep the jury from drawing unfavorable inferences against Clow as to whose name had been stricken therefrom. The prejudicial effect of the confession inevitably remained in the minds of the jury.

The judgment of the criminal court is reversed and the cause remanded for a new trial."

The now-unaltered confession of Cooper recommences at Page 383, R.T. (Page 244 of Single Appendix) and concludes at Page 419. Thus Cooper's confession consumed (332-304) + (419-383) = 64 pages of trial transcript.

Codefendant Bosby's statement begins at Page 433 R.T. (Page 273 of Single Appendix) and ends at Page 502, for a total of (502-433) = 69 pages of trial transcript.

Codefendant George Rhone's confession begins at Page 545 of R.T. (Page 338 of Single Appendix) and ends at Page 583 R.T. for a total of (583-545) = 38 pages.

Thus the total pages devoted to reading incriminating confessions to the jury are

64 for Cooper
69 for Bosby
38 for Rhone
171 Total. (Trial Transcript)

The testimony of the only two significant people's witnesses, Ardis Allison Robbins and Darrell Ashcraft consumed (148-37) = 111 pages.

It is thus seen that the major impact of the People's case against the petitioner consisted of the 171 pages devoted to incriminating confessions vis-a-vis the 111 pages devoted to two principal witnesses who, during their trial testimony, admitted telling police officers "4 Negroes carried out the crime." (R.T. Page 91 and R.T. Page 147; corresponds to Single Appendix 88 and 121.)

Petitioner is a Caucasian; codefendants Rhone, Cooper, and Bosby are Negroes. In view of the following cross-examination testimony elicited from People's Witness Robbins at Page 91, R.T. through Page 94, R.T. (Corresponds to Page 88 of Single Appendix), can it be declared beyond a reasonable doubt that the aforementioned confessions *did not* contribute to the conviction of petitioner?

"Q. You say that Harrington had red hair on the occasion you have described in your testimony; is that right? A. Right.

Q. Would that be some other color than his hair presently is? A. Right.

Q. In other words, his hair is not red now, is it? A. No, sir.

Q. Did you take a good look at him that day? A. Yes, sir.

Q. A very good look? A. I took a good look at them all when they came in.

Q. You told the police that there were four Negroes, didn't you? A. No, I thought they were, and—but, I

didn't know whether he was mixed or not when he had the red hair.

Q. Didn't you tell the police that you thought that the one with the red hair had colored blood? A. I said he might have some colored blood.

Q. And you told them that that same evening, isn't that true? A. I said I thought he was—he could be either, but I thought he had some colored blood.

Q. He could be either what or what? A. White or mixed.

Q. Well, do you recall giving a statement to the police on the evening of December the 11th at the Firestone Substation, 7901 South Compton Avenue? A. I was down there, yes, sir.

Q. And that would have been approximately 5:40 that same night, some time about 6:00 o'clock? A. I suppose around there somewhere.

Q. Now, Mrs. Robbins, I am showing you a transcript of the interview that you had with the Sheriff's officers that night. I want to ask you to read to yourself on page 4, typewritten 4, line 8 through line 10, then lines 18 and 19—we will do that first. A. You will have to tell me again which ones.

Q. All right. This is page 4 we are looking at, correct? A. Right.

Q. Then, read lines 8 through 10 to yourself. A. Okay.

Q. Have you done so? A. It is both—

Q. Just a minute, just read to yourself.

Have you done that? A. All right.

Q. Now, read to yourself also lines 18 and 19.

Have you done that? A. Yes.

Q. All right.

Now, I want to turn to page 10 and ask you to read to yourself lines 3 through line 12, on page 10 of your statement.

Have you done so? A. Mm-hum.

Q. Now, let me ask you if you gave the following answers to the following questions in the course of that interview—reading now, your Honor, from page 4, lines 8 through 10:

"Q. —by one of the police officers—"Both colored? A. Uh-huh, and I think the other one was colored, too; I think the red-head is at least partially colored.

"Q. Partially colored? A. Uh-huh, he may have some white blood in him."

Now, down to page 18, lines 18 and 19 on the same page:

"Q. And the other fellow is a light-complected person, at least partially colored? A. Uh-huh."

A. I thought he was.

Q. Now, let me read from page 10 and ask you if you gave these answers to these questions:

"Q. Now, red hair, how did he wear his red hair? A. Just back, I think.

"Q. Pompadour, or was there a wave in it? A. No, it isn't the slick type.

"Q. It isn't the slick type? A. No.

"Q. Now, did the hair look like it could possibly be colored, mixture or colored? A. I would say no, that is what I would judge, that he did use peroxide on it.

"Q. Did he appear to be colored? A. Partly colored, I would say.

"Q. Partly colored? A. Uh-huh."

Now, did you give all of those answers to all of those questions which I have just read? A. I guess I did.

Mr. Warnberg: Objected to as being incompetent, irrelevant and immaterial, your Honor; there seems to be nothing impeaching in the answers given at that time.

The Court: The objection is overruled."

Similarly, the cross-examination of prosecution witness Ashcraft at Page 146, R.T. (Page 120 of Single Appendix):

Cross Examination by Mr. Walton:

"Q. Mr. Ashcraft, you said you heard a shot and saw Mr. Serna fall backwards; is that correct? A. That's correct.

Q. Now, Mr. Serna was behind the refrigerator at that time; is that correct? A. Yes.

Q. You were, also? A. No; at that time, no.

Q. Where were you? A. I was up by the cash register at the time.

Q. And you say you saw Harrington there, the fellow sitting behind me? A. He was in front of the candy rack.

Q. Is that the place marked "Candy case" on the diagram, People's 4? A. That's right.

Q. This is at the time the shot went off? A. No, that was before the shot went off.

Q. And now, at the instant this shot went off, where was he, if he was in there? A. I do not know.

Q. He wasn't behind the refrigerator, was he? A. No, he was not. I do not think so.

Q. Now, as you sit there this afternoon and look at Harrington, do you think he is Negro? A. No, I do not.

Q. Didn't you tell the officers you thought that all four of them were Negro? A. I did.

Mr. Walton: I have nothing further.
The Court: Mr. Gordon."

Again, the simple question is asked:

When the two key witnesses for the prosecution identify all four assailants as Negroes, and petitioner is a Caucasian, can it be said beyond a reasonable doubt that the *Bruton-Roberts-Brookhart* v. *Janis* error did not contribute to the conviction?

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229; *Chapman* v. *California* (1967), 386 U.S. 18, 23, 17 L.Ed.2d 705, 710, 87 S.Ct. 824.

The entire confessions are reprinted in the Single Appendix.

Upon consulting the trial transcript testimony of Ardis Robbins and Darrell Ashcraft, it may be noted that both claimed petitioner "drew a gun" and otherwise participated in the crime. However, the question remains, having erred in the Caucasian v. Negro identification, is not the ability of these two witnesses to perceive, recall and narrate placed in substantial doubt?

Petitioner asserts it is; petitioner asserts that beyond question the incriminating confessions contributed to his conviction and if a federal harmless error rule is even required, the proper application of same must result in a reversal of the conviction of Glenn Martin Harrington.

Conclusion

For the foregoing reasons, authorities, and arguments, it is respectfully and prayerfully requested that the conviction of Glenn Martin Harrington be reversed by this Honorable Supreme Court of the United States of America, without recourse to any "harmless error" rules, and without remand to lower courts for further consideration.

Respectfully and prayerfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1968
No. 750

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF FOR RESPONDENT

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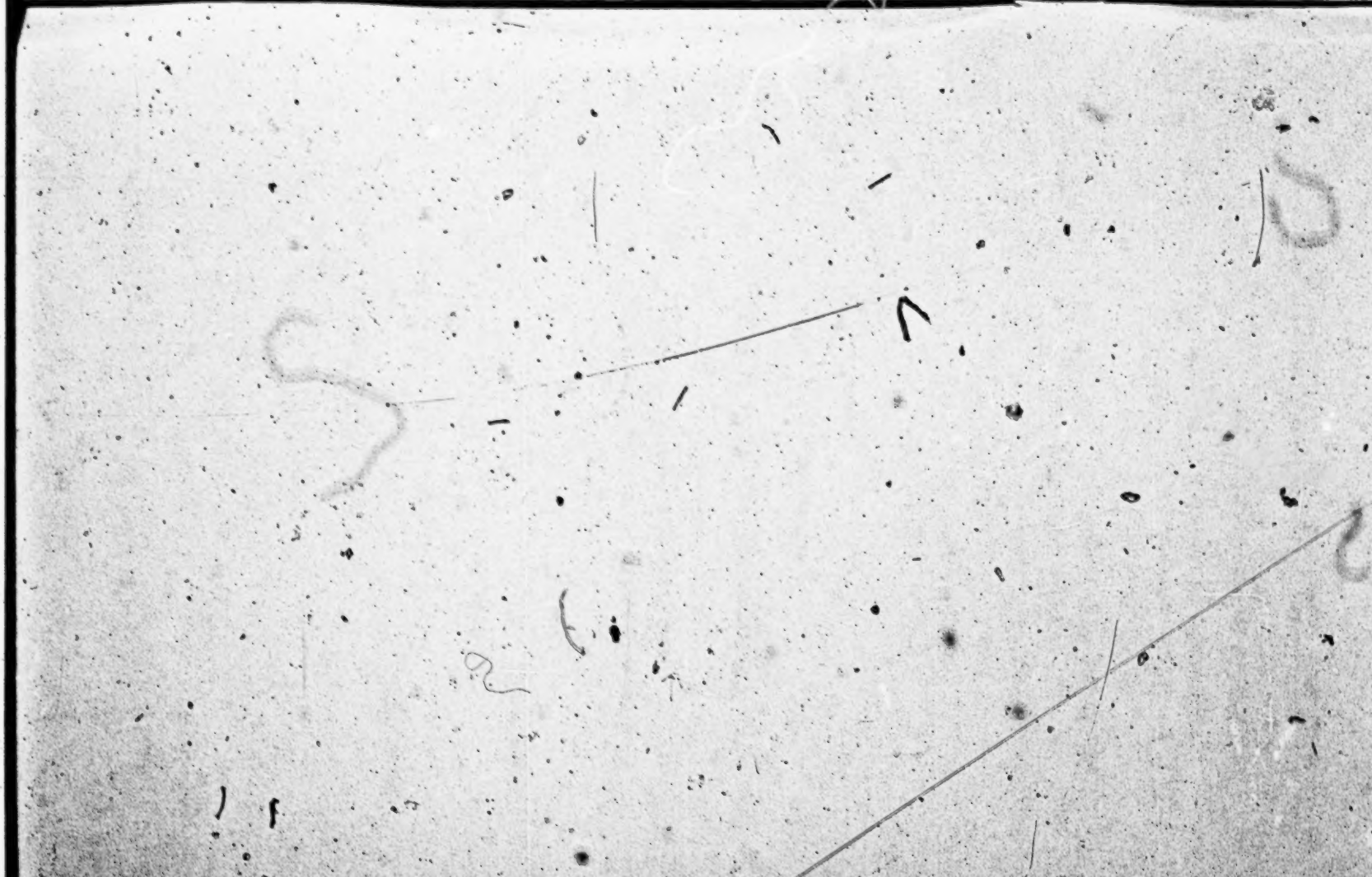

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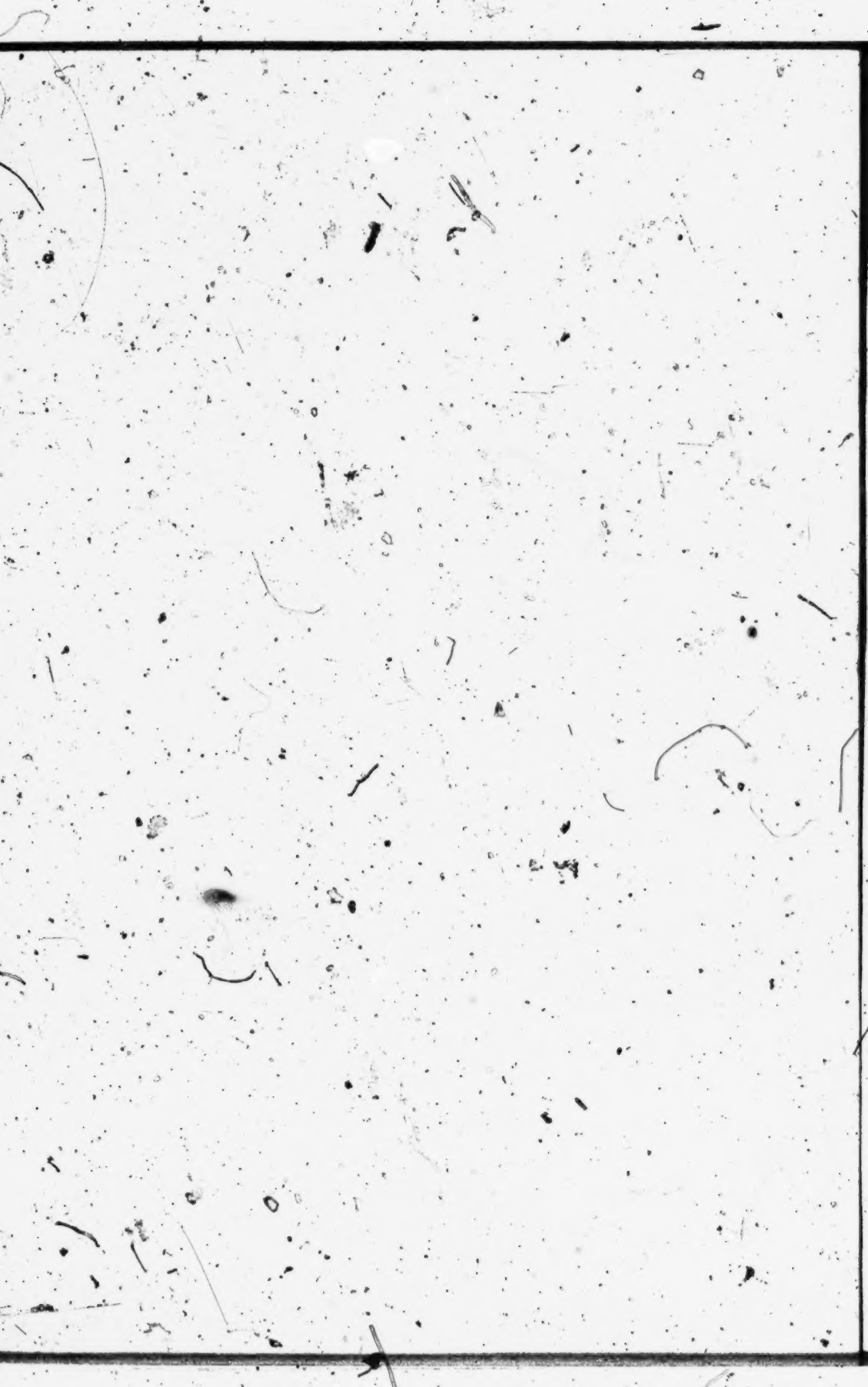
BRIEF FOR RESPONDENT

Opinion Below

These proceedings on certiorari arise out of petitioner Harrington's 1965 conviction for first degree murder. The judgment of conviction was affirmed by the Court of Appeal, Second Appellate District, Division Two, State of California, and is reported in *People v. Bosby, et al.*, 256 Cal. App. 2d 209, 64 Cal. Rptr. 159 (1967). The Supreme Court of California denied petitioner Harrington's petition for a hearing.

Jurisdiction

Jurisdiction is conferred on this Court by Title 28, section 1257(3) of the United States Code.



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Statutes Involved

Relevant statutes and constitutional amendments, federal and state are set forth in the Appendix.

Questions Presented

1. Do the extrajudicial statements of the three codefendants fall within the ban of *Bruton v. United States,* 391 U.S. 123 (1968)?

2. Should the harmless error standard as defined in *Chapman v. California,* 386 U.S. 18 (1967) be made applicable to a *Bruton* type error?

3. Was the admission of the extrajudicial statements of the three codefendants harmless as to petitioner Harrington?

4. Should the change in law effectuated by this Court in *Bruton v. United States, supra,* be afforded retroactive application?

Statement of the Case

On January 27, 1965, an information was filed in the Superior Court of Los Angeles County, charging Jesse Bosby, Gilbert Cooper, George Rhone, Jr., and petitioner Harrington with murdering Benjamin G. Serna on December 11, 1964. [R. 3-4.] All the defendants entered pleas of "Not Guilty." Each defendant was represented by separate counsel. [R. 1, 6.] Each defendant made motions to sever, which were all denied by the trial court. [R. 8-13, 29-30, 34-43, 49.] After a two-week trial, the jury found each defendant guilty of murder in the first degree. [R. 1.] Thereafter the same jury fixed the penalty for each defendant as imprisonment in the state prison for life. [R. 2.] Each defendant filed a notice of appeal. [R. 2, 428.]

The order of the Court of Appeal affirming defendants' convictions was entered on November 21, 1967. [R. 429.] The Court of Appeal's denial of a rehearing was entered on December 12, 1967. The Supreme Court of California denied a hearing on January 17, 1968. [R. 441.]

A timely petition for Writ of Certiorari was filed in this Court. The petition for certiorari was granted on November 18, 1968, in Number 750, October Term, 1968. [R. 442.]

Statement of Facts

In the afternoon of December 11, 1964, three colored men and a white man were observed to switch cars two blocks from a grocery and liquor store located at 6126 South Holmes Avenue, Los Angeles. They drove off in the second car. One man remained in the first car with the motor running. [R. 140-142, 146-147.] The witness who observed this stated that the white man had red hair. [R. 151.]

At approximately 2:15 p.m. on December 11, 1964, codefendants Jesse Bosby and Gilbert Cooper entered this store. Cooper asked the proprietor, Mrs. Ardis Allison Robbins, if she would cash a payroll check. She indicated that she would but would have to examine it first. Cooper, after reaching into his pocket, stated that he must have left his check in his car and went outside to get it. [R. 56-59, 105-107.] In the interim, Bosby engaged Darrell Ashcraft, the brother of Mrs. Robbins, in a conversation regarding a particular size bottle of wine. [R. 108, 116.]

When Cooper returned, he was followed by petitioner Harrington and codefendant George Rhone, Jr., who

took positions within the front of the store. [R. 60.] Mrs. Robbins remembered seeing them earlier outside her store, recalling in particular petitioner Harrington's bright red hair. [R. 58.] Mrs. Lottie Mae Williams, a customer who observed petitioner Harrington enter the store, also remarked about his bright red hair. [R. 123, 127-128, 132-133.] After examining Cooper's driver's license, Mrs. Robbins refused to cash the check. [R. 60-62.]

At this point, Benjamin Serna, a store employee, collided with Bosby, and both men fell down, knocking down a potato chip rack. [R. 62, 75-77.] When both men arose, Mr. Serna moved toward Mrs. Robbins in a jerking fashion as if being prodded by Bosby whom she heard say, "Man, I told you not to give me any trouble." [R. 78-79, 98-99.]

While Mrs. Robbins' attention was diverted in the direction of Bosby and Mr. Serna, Mr. Ashcraft who could not see them from his position nearer the front of the store, observed petitioner Harrington first and then Cooper draw a gun. Petitioner Harrington told Mr. Ashcraft to "Hold it." [R. 109-110.] When Mrs. Robbins observed that Bosby had a gun pressed against Mr. Serna's body, she reached for her own gun which was kept in a drawer beneath the cash register. As she drew it out, Rhone moved forward and seized her wrist and either he or Cooper removed the gun from her hand. [R. 64-65, 111-112.]

A shot rang out from the area where Bosby and Mr. Serna were located. Serna took a few steps forward with blood running from his mouth and shirt and then fell dead upon the floor. [R. 65-66.] At this time Mrs. Robbins noticed a gun in petitioner Harrington's

hand. [R. 66.] Both Mrs. Robbins and Mr. Ashcraft complied with orders to move to the rear of the store. [R. 66-67, 112.] The money in the cash register was not taken as the electric plug had been knocked out of its socket. [R. 68-69.]

Two bystanders on the street saw the defendants run to the car in which they had arrived and drive rapidly away. [R. 130-131, 158.] Mrs. Lottie Mae Williams observed petitioner Harrington get in the rear seat noting his red hair. [R. 132.] Another bystander testified that the white man had red hair. [R. 158.] The defendants were seen moments thereafter when they again switched cars at the spot nearby where the second car waited with another man behind the wheel and the motor running. [R. 143, 148.]

Subsequently, each of the defendants was arrested and each gave statements after being advised of his constitutional rights in accordance with the rules enunciated in *People v. Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965).[1] In substance, each defendant was advised of his right to remain silent, his right to counsel, and that any statement he made could be later used against him. [R. 173-174, 271, 327, 363.]

In a statement taken by a stenographic reporter, Cooper stated that he went into a liquor store to cash a check. [R. 202-203.] Three people came in behind him. One of them hit an old man, who grabbed a bottle. The man told the old man to stop, and when the old

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[1]Since this case was tried before *Miranda v. Arizona*, 384 U.S. 436 (1966), the standards enunciated in *People v. Dorado*, 62 Cal. 2d 338 (1965), are applicable. *See Johnson v. New Jersey*, 384 U.S. 719, 733 (1966).

man did not, he shot him. [R. 204-205.] When the lady behind the cash register reached for a gun, Cooper grabbed her arm so that the man would not shoot her. [R. 208-209.] Cooper raced to his car, and the other three jumped into the car. [R. 210.] A white boy said, "Get it out of here, let's get out of here." [R. 211.] After driving two blocks, another man told Cooper to stop. [R. 213.] Here the other men entered a green 1957 Ford. [R. 247.] Cooper denied conspiring to rob the liquor store at 6126 Holmes Avenue in Los Angeles or knowing the other three men. [R. 264.] The trial court advised the jury that this statement was only to be received against Cooper and not as to any other defendant. [R. 244-245.]

At a later time, Cooper admitted to the police that he and Bosby discussed robbing a market; that the four of them drove to a market; that he presented his check for cashing; that he saw Bosby hit an old man; that he heard a gunshot; and that all four of them ran from the store and got into his vehicle. [R. 321-323.] The trial court advised the jury that this statement was only to be received against Cooper and not as to any other defendant. [R. 321.] In relating both of Cooper's statements, the officer did not mention petitioner Harrington's name but he did refer to "this white guy," "white boy" and a "white man," [R. 205, 211, 251, 259, 264, 322-323.]

In a statement taken by a stenographic reporter, Bosby indicated that he and Cooper discussed getting money at the Robbins' market. [R. 275.] They met two others who joined in the plot. [R. 276.] When they entered this market, Bosby went to the beer box. Cooper attempted to cash a check. [R. 278.] Bosby got into an argument with an old man. The old man threw a

can of tomatoes at Bosby. [R. 280.] After the old man ran, Bosby heard a pop. [R. 281.] Bosby observed two revolvers in the hands of his companions. He ran out of the store and got in Cooper's car. [R. 284-285.] Bosby denied either possessing a gun or shooting the old man. [R. 310.] Bosby stated that he did not know the Caucasian's name and he described him as a "blond-headed fellow." [R. 286.] The trial court advised the jury that this statement was only received against Bosby and not as to any other defendant. [R. 273.]

In a statement taken by a stenographic reporter, Rhone admitted to the police that he and the other three codefendants discussed "knocking over" the market. The officer reading this statement mentioned the names of the three codefendants, which included petitioner Harrington. [R. 340-341.] They went in two separate cars to rob the market. [R. 342.] Rhone was supposed to watch inside the market. [R. 344.] Rhone was the last one to enter the store. Bosby and an old man got into a scuffle. [R. 345.] When the lady at the cash register pulled a gun, Rhone grabbed her arm and Cooper grabbed the gun out of her hand. [R. 347.] He heard a shot ring out. [R. 348.] He saw an old man stumble, fall, get up again, and start running. Bosby and Cooper tried to get into the cash register, but were unable to pull the drawer open. All of them ran out of the market and got in Cooper's car. [R. 351-352.] The trial court advised the jury that this statement was only to be received against Rhone and not as to any other defendant. [R. 338.]

In his statement to the police, petitioner Harrington said that he and three Negro companions drove to a market; that while he stayed in the car, the three colored fellows entered the store; that he later entered the store

to purchase cigarettes; that he fled with them after the murder; and that thereafter he had dyed his hair black and shaved off his moustache. [R. 363-365.] The trial court advised the jury that this statement was only to be received against petitioner Harrington and not as to any other defendant. [R. 363.]

Rhone was the only defense witness. He testified that it was not his intention to commit a robbery when he entered the market on December 11, 1964. He only wanted to "case" the place. Previously, he had discussed holding it up. [R. 387, 389.]

Summary of Argument

1. The extrajudicial statements of the three codefendants do not fall within the ban of *Bruton v. United States*, 391 U.S. 123 (1968). Since Rhone was cross-examined by petitioner Harrington's trial counsel, the admission of Rhone's confession did not deny petitioner Harrington his constitutional right to be confronted with the witnesses against him. The extrajudicial statements of Bosby and Cooper only refer to a "male white," "white guy," etc. Such references do not necessarily implicate petitioner Harrington. In fact the description of the white man in Bosby's statement does not fit that of petitioner Harrington.

2. Irrespective of the applicability of *Bruton*, the admission into evidence of three codefendants' extrajudicial statements does not automatically require a reversal of petitioner Harrington's conviction. The vast majority of the cases which have discussed this issue have ruled that the rule in *Bruton* is subject to a harmless error standard. Both logic and sound policy support the majority view, for there are significant variables in codefendants' extrajudicial statements with respect

to their inculpating effect and whether they added critical weight to the prosecution's case.

3. Under the harmless error standard as defined in *Chapman v. California*, 386 U.S. 18, 24 (1967), petitioner Harrington was not prejudiced by the admission of the three codefendants' extrajudicial statements. The case against petitioner Harrington was exceedingly strong, for this was no circumstantial evidence case. Three prosecution eye-witnesses were positive about petitioner Harrington's identification. Petitioner Harrington admitted to the police that he fled with three Negroes after the murder, and that thereafter he had dyed his hair black and shaved off his moustache.

Petitioner Harrington was not denied his Sixth Amendment right of confrontation with respect to codefendant Rhone's confession. Rhone took the stand in his own defense and was cross-examined by petitioner Harrington's trial counsel.

With regard to the extrajudicial statements of Bosby and Cooper, besides the fact that they do not name petitioner Harrington, they furnish few details of the white man's role in the robbery. In view of the exceedingly strong prosecution evidence and the lack of specificity about the white man's robbery role in Bosby's and Cooper's statements, the admission of these statements was harmless as to petitioner Harrington.

4. Respondent respectfully requests that this Court reconsider the retroactivity ruling of *Roberts v. Russell*, 392 U.S. 293 (1968). A reweighing and a rebalancing of the three relevant considerations enunciated in *Stovall v. Denno*, 388 U.S. 293, 296-97 (1967), leads inevitably to the conclusion that *Bruton* should be denied retroactive application.

ARGUMENT

I

The Extrajudicial Statements of the Three Codefendants Do Not Fall Within the Ban of Bruton.

In *Bruton v. United States*, 391 U.S. 123 (1968), the confrontation clause of the Sixth Amendment was held violated where a codefendant's confession was used against Bruton in a federal prosecution. The codefendant who implicated Bruton was not a witness in the trial. The Court held that an instruction that the confession was only to be considered as against the maker, was not an adequate substitute for Bruton's constitutional right of cross-examination. The codefendant had confessed that he and Bruton had committed an armed postal robbery which statement, the Court said, was powerfully incriminating. The Court held in *Bruton*, and made even more clear in the concurring opinion of Mr. Justice Stewart, that the rationale of the Sixth Amendment's confrontation clause is to exclude damaging extrajudicial statements of a codefendant who is not subject to cross-examination.

Here, Jesse Bosby, Gilbert Cooper, George Rhone, Jr. and petitioner Harrington made statements to the police which were admitted into evidence at their joint trial. Each statement will be examined in some detail in Argument III, *infra*, pp. 18 through 24.

For the purpose here, it is sufficient to point out that codefendant Rhone's statement, which is a confession, is the only one that mentions petitioner Harrington's name. But in regard to Rhone's confession, he took the witness stand and was cross-examined by pe-

titioner Harrington's trial counsel. [See R. 419-420.] Thus, it appears that the confrontation rationale of *Bruton* would not seem to be applicable to Rhone's confession. Since Rhone was cross-examined by petitioner Harrington's trial counsel, the admission of Rhone's confession did not deny petitioner Harrington's constitutional right to be confronted with the witnesses against him. *See People v. Willis,* 30 A.D. 2d 817, 292 N.Y.S. 2d 298 (1968); *People v. Burwell,* 30 A.D. 2d 842, 292 N.Y.S. 2d 965 (1968); *People v. Camarilla,* 266 Cal. App. 2d ....., 266 A.C.A. 555, 567-68, 72 Cal. Rptr. 296, 303 (1968); *People v. Curry,* 265 Cal. App. 2d ...., 265 A.C.A. 894, 899, 71 Cal. Rptr. 573, 576, n. 2 (1968); *United States v. Hoffa,* 402 F. 2d 380, 386-87 (1968); *State v. Fox,* .... N.C. ...., 163 S.E. 2d 492, 502 (1968); *People v. Flowers,* 1 N.C.A. 612, 162 S.E. 2d 34 (1968); *But cf. United States v. Guajardo-Melendez,* 401 F. 2d 35, 38, n. 5 (7th Cir. 1968); *People v. Scott,* ..... Ill. App. 2d ....., 241 N.E. 2d 579, 583 (1968).

As to the three statements of Bosby and Cooper (two of which are confessions), they only refer to a "male white," "white guy," "Caucasian," etc. and do not name petitioner Harrington. Such broad references do not necessarily implicate petitioner Harrington. In fact Bosby's statement describes the white man as a "blond-headed fellow" [R. 286], which does not fit the description of petitioner Harrington's bright red hair. Obviously, if the jury literally believed Bosby's description, they would think someone other than petitioner Harrington was involved. The situation which we are presently considering is entirely different from the "powerfully incriminating statements" in *Bruton. Id.* at 135.

In view of the foregoing, respondent submits that the extrajudicial statements of the three codefendants do not fall within the ban of *Bruton*.

II

Irrespective of the Applicability of Bruton, the Rule in Bruton Is Subject to the Chapman Harmless Error Standard

Regardless of the applicability of *Bruton* to the instant case, respondent urges that the rule in *Bruton* is subject to the harmless error standard as defined in *Chapman v. California*, 386 U.S. 18, 24 (1967). As this Court pointed out in *Bruton*, "not every admission of inadmissible hearsay can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' (Citations.)" *Id.* at 135.

In discussing this issue, the California Supreme Court stated in *People v. Flores*, 68 Cal. 2d 563, 568, 68 Cal. Rptr. 161, 164, 440 P. 2d 233, 236 (1968), that the *Chapman* harmless error standard is applicable where a codefendant's extrajudicial statement which implicates the defendant is improperly admitted into evidence. This case specifically rejected a prejudicial *per se* rule. (68 Cal. 2d at 568, 68 Cal. Rptr. at 164, 440 P. 2d at 236, n. 5.) Other state cases have also expressly reached the same conclusion with regard to the applicability of *Chapman*. *People v. Ortiz*, 30 A.D. 2d 510, 294 N.Y.S. 2d 625 (1968); *People v. DeVine*, 57 Misc. 2d 862, 293 N.Y.S. 2d 691 (1968); *see also, People v. Camarillo*, 266 Cal. App. 2d ....., 266 A.C.A. 555, 567-

69, 72 Cal. Rptr. 296, 303-04 (1968); *People v. Schwartzman*, 266 Cal. App. 2d ...., 266 A.C.A. 948, 965-66, 72 Cal. Rptr. 616, 627-28 (1968); *People v. Curry*, 265 Cal. App. 2d ....., 265 A.C.A. 894, 899-901, 71 Cal. Rptr. 573, 575-76 (1968); *but cf. People v. Barrett*, 267 Cal. App. 2d ....., 267 A.C.A. 154, 164, 72 Cal. Rptr. 681, 687 (1968), where it was held that in the absence of a confession from the defendant, the admission of a codefendant's statement incriminating defendant, if error, was necessarily prejudicial.

Two federal cases have explicitly indicated that *Chapman* is applicable in a *Bruton* type of situation. *United States v. Lipowitz*, 401 F. 2d 591, 593 (3rd Cir. 1968); *United States ex rel. Johnson v. Yeager*, 399 F. 2d 508, 511 (3d Cir. 1968) (U.S. appeal pending); *see also, Evans v. Dutton*, 400 F. 2d 826, 828, 829, nn. 4 and 15 (5th Cir. 1958).

Although all but one of the following cases were reversed, they each cite *Bruton* and fairly indicate by the language used in the decision that a *Bruton* type error is not automatically reversible; *People v. Miller*, 40 Ill 2d 154, 158-59, 238 N.E. 2d 407, 409 (1968, U.S. appeal pending); *People v. Boone*, 22 N.Y. 2d 476, 293 N.Y.S. 2d 287, 239 N.E. 2d 885 (1968); *United States v. Guajardo-Melendez*, 401 F. 2d 35, 38-39 (7th Cir. 1968); *Atwell v. United States*, 398 F. 2d 507, 510-11 (5th Cir. 1968); *People v. Willis*, 30 A.D. 2d 817, 292 N.Y.S. 2d 298 (1968); *People v. McKendall*, 30 A.D. 2d 717, 290 N.Y.S. 2d 987 (1968); *People v. Pilon*, 30 A.D. 2d 365, 293 N.Y.S 2d 393 (1968).

Two federal cases decided before *Bruton* clearly hold that a *Bruton* type error was federal constitutional error which was subject to a harmless error rule. *Hoop-*

er v. Swenson, 401 F. 2d 352 (8th Cir. 1968); *United States v. Beatty,* 282 F. Supp. 202, 215-16 (D. Md. 1968).

In *Commonwealth v. Myers,* 429 Pa. 378, 239 A. 2d 805 (1968), the Supreme Court of Pennsylvania noted that *Bruton's* petition for certiorari had been granted. (239 A. 2d 808, n. 6.) It held that an involuntary confession of a codefendant implicating the defendant was "equivalent to an involuntary confession (by defendant), thus placing this error within the ambit of the automatic reversal doctrine." (239 A. 2d 808-09, n. 7.) Since this case involved an involuntary confession, it is distinguishable from the instant case.

Some cases have summarily reversed on the basis of *Bruton* without discussing the applicability of any harmless error standard. *E.g, United States v. Lyon,* 397 F. 2d 505, 510 (7th Cir. 1968); *United States v. Kelly,* 399 F. 2d 692 (3d Cir. 1968); *People v. Fox,* .... N.C. ...., 163 S.E. 2d 492, 502 (1968); *Branch v. State,* 212 So. 2d 29, 32-33 (Fla. 1968); *Gelis v. State,* 215 So. 2d 86 (Fla. 1968); *People v. Burwell,* 30 A.D. 2d 842, 292 N.Y.S. 2d 965 (1968).

Thus it appears that the vast majority of the cases which have discussed this issue have ruled that a *Bruton* type error is not automatically reversible. Respondent submits that logic and sound policy support the majority view. The extrajudicial statements discussed in these cases reflect material variances with respect to their inculpating effect [*E. g., People v. Flores,* 68 Cal. 2d 563, 568, 68 Cal. Rptr. 161, 164, 440 P. 2d 233, 236 (1968)], and whether they added critical weight to the prosecutor's case. [*E.g., Atwell v. United States,* 398 F. 2d 507, 510 (5th Cir. 1968); *People v. Willis,*

30 A.D. 2d 817, 292 N.Y.S. 2d 298 (1968).] Because of such significant variables, the rule in *Bruton* should be made subject to a harmless error rule. To rule otherwise would mean that convictions would be reversed for errors that conceivably played no part in the verdicts.[2]

The effect of *Bruton* is to make certain hearsay evidence inadmissible, despite limiting instructions. *Id.* at 128, n. 3. The rationale given for this holding is that there is a substantial risk that a jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining a petitioner's guilt. *Id.* at 126. Yet there are individual cases where a jury can follow such limiting instructions. *See United States v. Hoffa,* 402 F. 2d 380, 387 (7th Cir. 1968). The rule in *Bruton* is not so basic to a fair trial that an infraction can never be treated as harmless error, such as in a coerced confession case or a deprivation of the right to counsel. *Cf. Chapman v. California, supra,* at 23, n. 8.[3]

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[2]See Bybee, Jr., *A Comment on Application of the Harmless Constitutional Error Rule to "Confession" Cases,* 1968 Utah Law Review 144, 153; wherein the applicability of the harmless error rule is discussed as to confessions obtained in violation of *Escobedo v. Illinois,* 378 U.S. 478 (1964) and *Miranda v. Arizona,* 384 U.S. 436 (1966). It is there concluded: "Without a harmless constitutional error rule, otherwise valid convictions would have to be reversed due solely to the presence of what might be insignificant evidence."

[3]In the instant case, all defendants were advised of their *Dorado* constitutional rights before they made their extrajudicial statements as contrasted with the co-defendant in *Bruton. Id.* at 124, n. 1. The codefendant's confession in *Bruton* was in-

(This footnote is continued on the next page.)

Utilization of the harmless error rule is a reasonable means of avoiding inundation of the courts on this issue. A fully retroactive *Bruton* which is not subject to a harmless error rule will cause many collateral attacks on old convictions. Again, such convictions could be overturned on collateral attack for errors that played no part in the judgment. To require a general release of such prisoners would cripple the orderly administration of criminal law, since their cases would afford the least likelihood of a successful retrial (stale evidence, missing witnesses, etc.).

Moreover, it is interesting to note the language contained in *Gilbert v. California,* 388 U.S. 263 (1967). There the trial court admitted into evidence an accomplice's pretrial statements which referred to petitioner 159 times in the course of reciting petitioner's role in the robbery and murder. Petitioner asked this Court to reconsider *Delli Paoli v. United States,* 352 U.S. 232 (1957). In response to this request, this Court stated:

> ". . . We have no occasion to pass upon this contention. The California Supreme Court has rejected the Delli Paoli rationale, and relying at least in part on the reasoning of the Delli Paoli dissent, regards cautionary instructions as inadequate to cure prejudice. *People v. Aranda,* 63 Cal. 2d 518, 407 P. 2d 265. The California court applied Aranda in this case but held that any error as to

admissible even against the declarant. It is easy to see that since the prosecution's reason for introducing the codefendant's confession in *Bruton* was negatived by its inadmissibility, there was nothing against which to balance the possible risk of prejudice to the non-declarant.

> Gilbert in the admission of King's statements was harmless. The harmless-error standard applied was that 'there is no reasonable possibility that the error in admitting King's statements and testimony might have contributed to Gilbert's conviction,' a standard derived by the court from our decision in Fahy v. Connecticut, 375 U.S. 85. (Footnote omitted.) Fahy was the basis of our holding in Chapman v. California, 386 U.S. 18, and the standard applied by the California court satisfies the standard as defined in Chapman.
>
> "It may be that the California Supreme Court will review the application of its harmless-error standard to King's statements if on the remand the State presses harmless error also in the introduction of the in-court and lineup identifications. However, this at best implies an ultimate application of Aranda and only confirms that petitioner's argument for reconsideration of Delli Paoli need not be considered at this time." (388 U.S. 263, 268.)

The fair import of these remarks would suggest that the erroneous admission of a codefendant's statement which implicates a defendant is not automatically reversible. This is especially true when viewed in light of the retroactivity holding of *Roberts v. Russell,* 392 U.S. 293 (1968). (See discussion in Argument IV, *infra,* pp. 24 through 30.) Accordingly, it is submitted that the *Chapman* harmless error standard is applicable to a *Bruton* type error.

III

The Admission of the Three Codefendants' Extrajudicial Statements Was Harmless to Petitioner

The next issue to be determined is whether the admission of the three codefendants' extrajudicial statements may be termed harmless error under *Fahy v. Connecticut,* 375 U.S. 85 (1963) as exposited by *Chapman v. California,* 386 U.S. 18 (1967). In speaking of harmless error, this Court said in *Fahy v. Connecticut, supra,* at 86-87:

> ". . . We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. . . ."

In *Chapman v. California, supra,* at 24, this Court said in explaining *Fahy:*

> ". . . We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The Court also held that the burden was on the beneficiary of the error to make this showing.

Also, in *Chapman,* it is stated:

> ". . . And though the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners, (citation omitted), it was also a case in which, absent the constitu-

tionally forbidden comments, honest, fair-minded jurors might very well have brought in not guilty verdicts." (386 U.S. at 25-26.)

Under the foregoing criteria, it is respondent's contention that any error committed in admitting the three codefendants' extrajudicial statements was harmless as to petitioner Harrington. The case against petitioner Harrington was exceedingly strong, for this was no circumstantial evidence case. *Cf. Chapman v. California, supra.* As noted in the opinion of the California Court of Appeal, codefendants Rhone, Cooper and Bosby were readily identified as Negroes while Harrington was originally described as either white or a very light-skinned Negro. *People v. Bosby,* 256 Cal. App. 2d 209, 212, 64 Cal. Rptr. 159, 161, n. 2 (1967). The two victims, Mrs. Robbins and Darrell Ashcraft, both identified petitioner as one of the robbers who had drawn a gun. [R. 66, 109.] Petitioner Harrington ordered Ashcraft to "Hold it." [R. 109-110.] Mrs. Robbins mentioned petitioner Harrington's bright red hair. [R. 58.] A customer who had observed petitioner Harrington enter and leave the store identified petitioner Harrington and also remarked about his bright red hair. [R. 123, 127-128, 132-133, 137.] These three prosecution witnesses were positive in their identification of petitioner Harrington.

In addition, another witness who had observed three colored men and a white man switch cars shortly before the robbery testified that the white man had red hair. [R. 151.] A bystander who had observed the escape of the four robbers in an automobile testified that the white man had red hair. [R. 158.]

Furthermore, petitioner Harrington made some very incriminating statements to the police. He admitted that he was the red-haired man who had entered the store with his three Negro companions; that he fled with them after the murder; and that thereafter he had dyed his hair black and shaved off his moustache. [R. 363-365.] Respondent contends that such admissions can be used in the context of determining harmless error. *See People v. Charles,* 66 Cal. 2d 330, 343-44, 57 Cal. Rptr. 745, 425 P. 2d 545 (1967); *People v. Lara,* 67 Cal. 2d 365, 392-93, 62 Cal. Rptr. 586, 605, 432 P. 2d 202 (1967).

As indicated in the opinion of the California Court of Appeal, after the constitutionally admissible evidence is reviewed ". . . it is virtually inconceivable that any jury could have escaped the conclusion that Harrington was engaged in an attempted robbery and was answerable for the murder committed by his co-conspirator in the course thereof." *People v. Bosby,* 256 Cal. App. 2d 209, 217, 64 Cal. Rptr. 159, 164-65 (1967). In the language of *Chapman,* it is clear that, in the absence of the extrajudicial statements of the three codefendants, no honest, fair-minded jury could have brought in any other verdict other than guilty.

Petitioner Harrington has added all the pages of the extrajudicial statements of the three codefendants in the State Reporter's Transcript and has come out with a total of 171 pages. But these extrajudicial statements should be closely examined as to their references to petitioner Harrington.

Cooper's first statement was taken by a stenographic reporter. Cooper stated that "this white guy" was in the store when another man hit the old man. [R. 205.]

Cooper next stated that "the white boy" got in the front seat of his vehicle and said "Get it out of here, let's get out of here." The white boy did not have anything in his hands while the two colored boys had guns. [R. 211.] "This white man" and a Negro fellow nearly by-passed Cooper's vehicle before entering his car. [R. 251.] Cooper stated that "the white and the colored guy" were behind him while Cooper was in the store. [R. 258-259.] Cooper stated that the Caucasian had no colored blood in him. In this statement Cooper denied conspiring to rob this store. He denied knowing or even seeing before the other three persons who participated in the robbery. [R. 264.]

In Cooper's second statement, which was a confession, he stated that when he entered the store a second time to attempt to cash a pay check, Bosby, a tall white man, and a tall Negro fellow walked in behind him. Previously the four of them had driven to this store in Cooper's vehicle. After a gunshot, all four of them ran back to his vehicle. The white man sat in the rear seat. He described the white man as being approximately thirty years old, five eleven, and approximately 150 to 160 pounds. [R. 321-323.] Petitioner's name was not mentioned in either statement.

In a statement taken by a stenographic reporter, Bosby stated that he and Cooper met a male Negro and a male white two blocks from the market. [R. 276.] Bosby was the one who was supposed to get the money while the other three were supposed to see that everything was okay. [R. 277.] Bosby said that the Caucasian was a blond-headed fellow who was in his early thirties and was about five nine. Bosby did not even know the Caucasian's first name. [R. 286.] Later he

unintentionally met the Caucasian while walking on Wilmington Boulevard. Subsequently, he saw "the white g[illegible] in a Buick. [R. 289-290.] Bosby stated he never saw the Caucasian with a gun. A person named Charles told Bosby that the Caucasian was the type of person who wanted to make money and would not welsh on a business deal. [R. 296.] The "patty" was one of five people who got into two cars. [R. 301.] Charles and "the patty" walked toward the store together. [R. 302.] Bosby presumed that "the patty" entered the store with Charles. [R. 304.] Bosby did not know where "the patty" was in the store at the time of the gunshot. [R. 305.]

In a statement taken by a stenographic reporter, Rhone stated that he knew a male Caucasian by the name of Glen. [R. 339.] Glen was present when the four defendants discussed "knocking over" a market. [R. 340-341.] They drove to the vicinity of this market in two cars, with Rhone going in Glen's car. [R. 342.] Glen stated that he had a gun. [R. 343.] Petitioner Harrington and Cooper were standing in front of the cash register. [R. 344-345.] Glen and Rhone entered the store together. [R. 345.] At the time of the scuffle between Bosby and the old man, petitioner Harrington was standing next to Rhone. [R. 346.] When Cooper took the gun from the lady, petitioner Harrington was next to Rhone. [R. 348.] Rhone never saw Glen have his gun out. [R. 349.] Glen did not go over to the cash register and attempt to open it. [R. 351.] Glen got in the back seat of Cooper's vehicle. Glen is all white. The four defendants went three blocks and got into Glen's 1952 Ford. [R. 353.] Glen, the driver, proceeded to Rhone's house. [R. 355.] Rhone and Bosby

met Glen later that afternoon. [R. 356.] Glen was armed with a .22 for a while in the market. Rhone took Glen's gun when the lady went for a gun. [R. 358.] Rhone identified the gun that belonged to Glen. [R. 359]. Glen had not seen the market before the robbery. [R. 360.]

Rhone's confession is the only one that mentions petitioner Harrington's name and goes into detail about his role in the abortive robbery. But in regard to Rhone's confession, he took the witness stand in his own defense and was cross-examined by petitioner Harrington's trial counsel. [R. 419-420.] Thus *Bruton* does not apply to Rhone's confession. (See discussion in Argument I, *supra,* pp. 10 through 12.)

As to the extrajudicial statements of Bosby and Cooper, they do not name petitioner Harrington, although they do refer to a "male white," "white guy," "white man," etc. which does not necessarily implicate petitioner Harrington. In fact, Bosby's statement, which is a confession, describes the white man as a blond-headed fellow [R. 286], which does not fit the description of petitioner Harrington's bright red hair. Cooper's first statement [R. 199-214, 245-265.] was not a confession, since he denied being involved in the robbery. [R. 264.] It is hardly likely that the jury placed much credence in Cooper's first statement in view of his denial of guilt and his denial of knowing the other defendants. Cooper's second statement, which is a confession, is only three pages long. [R. 321-323.] The details of the white man's role in the robbery and the description of what he exactly did while in the store is extremely limited in both of Cooper's statements. This is also true of Bosby's statement. In this

connection, both Bosby and Cooper stated that they did not see petitioner Harrington with a gun [R. 211, 296], which is at variance with the testimony of the prosecution witnesses.

In comparison with Bosby's and Cooper's statements, the prosecution percipient witnesses provided the jury with many additional facts as to petitioner Harrington's activities while in the market. In view of the exceedingly strong prosecution evidence and the lack of specificity about the white man's robbery role in Bosby's and Cooper's statements, it is submitted that beyond a reasonable doubt petitioner Harrington would have been convicted if these statements had not been received into evidence. Or in other words, there is no reasonable possibility that Bosby's and Cooper's incriminating statements might have contributed to petitioner Harrington's conviction, for no honest, fair-minded jury could have brought in another verdict other than guilty. *See Chapman v. California, supra.*

IV

The Holding in Roberts v. Russell Should Be Re-examined as to the Retroactivity of Bruton v. United States

We respectfully urge that this Court reconsider *Roberts v. Russell*, 392 U.S. 293 (1968), where it was held that *Bruton v. United States*, 391 U.S. 123 (1968) was to be given complete and unqualified retrospective application. This is the first instance that we are aware of where a respondent has had an opportunity to present its views on this issue in a case to be formally argued before this Court. In several recent cases this Court has denied retroactive application to constitu-

tional rules of criminal procedure established by innovative decisions which overruled cases sanctioning former practice. *De Stefano v. Woods*, 392 U.S. 631 (1968); *Stovall v. Denno*, 388 U.S. 293 (1967); *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965).

In *Stovall v. Denno, supra*, at 297, this Court stated the considerations that affect the judgment whether a case reversing prior doctrines in the area of the criminal law should be applied only prospectively:

> ". . . (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Respondent strongly urges that a reweighing and a rebalancing of these three relevant considerations leads inevitably to the conclusion that *Bruton* should be denied retroactive application.

The purpose of this Court in *Bruton* was to enhance the reliability of the fact-finding process. But this conclusion in itself does not compel a retroactive application of the new doctrine. As the Court said in *Johnson v. New Jersey, supra*, 384 U.S. at 728-29:

> "Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. . . . We are thus concerned with the question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial."

In this regard, *Stovall v. Denno, supra,* limited the applicability of the new exclusionary rule articulated in *United States v. Wade,* 388 U.S. 218 (1967), and *Gilbert v. California,* 388 U.S. 263 (1967), to lineups which were conducted prior to the date of those decisions. This Court did so notwithstanding the fact that the new rule was one which went to the reliability of the fact-finding process at trial, stating:

> ". . . A conviction which rests on a mistaken identification is a gross miscarriage of justice. The Wade and Gilbert rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Does it follow that the rules should be applied retroactively? We do not think so."
>
> *Stovall v. Denno, supra,* at 297.

In *Bruton,* this Court felt that the California Supreme Court's reasoning in rejecting *Delli Paoli* in *People v. Aranda,* 63 Cal. 2d 518, 529, 47 Cal. Rptr. 353, 358-59, 407 P. 2d 265, 271-72 (1965) was sound and persuasive. Yet in *Roberts,* the Court ignored the reasoning of that same court in *People v. Charles,* 66 Cal. 2d 330, 333, 57 Cal. Rptr. 745, 747, 425 P. 2d 545, 547 (1967), wherein *Aranda* was held not to be retroactive since the former procedure did not create a grave risk of convicting innocent defendants. Since the California Supreme Court concluded that the admission of a codefendant's confession did not affect the integrity of the fact-finding process, and because this Court specifically relied upon *Aranda* in overruling *Delli Paoli,* it would seem that the California Supreme

Court's conclusion as to retroactivity would be persuasive.[4]

Under the former California practice, appropriate limiting instructions had to be given whenever an extrajudicial statement only against the declarant was to be used in a joint trial. With respect to the ability of the jury to follow such limiting instructions, this Court said in *Opper v. United States*, 348 U.S. 84, 95 (1954).

> ". . . The trial judge here made clear and repeated admonitions to the jury at approximate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. (Footnote omitted.) To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. . . ."

With regard to the impact which the former California practice may have had on the integrity of the fact-finding process at trial, it is significant that the use of such statements in a joint trial was carefully circumscribed to avoid prejudice to non-confessing defendants. "Where, however, statements of a codefendant are admitted which are irrelevant or unnecessary in establishing a case against him and are extremely prejudicial and inadmissible hearsay as to a codefendant, they should be excluded from evidence." *People v. Foote*, 48 Cal. 2d 20, 23, 306 P. 2d 803, 805

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[4] A similar conclusion was reached by the New Jersey courts. Before *Bruton*, *Delli Paoli* was rejected in *State v. Young*, 46 N.J. 152, 215 A. 2d 352 (1965). *Young* was cited with approval in *Bruton*. *Id.*, 391 U.S. 123, 129-30, n. 4. This new rule was held not to be retroactive in *State v. Blanchard*, 98 N.J. Super. 22, 235 A. 2d 913, 916 (1967).

(1957). *See also, People v. Chavez,* 50 Cal. 2d 778, 790, 329 P. 2d 907, 914-15 (1958).

Therefore, we submit that the former California practice was attended by effective safeguards which ensured the integrity of the truth-determining process at trial. Under these circumstances, the probability that this former practice resulted in any improper conviction is extremely small and furnishes little support for a decision imposing *Bruton* retroactively. Particularly so, when this limited probability is weighed against the prior justified reliance upon the old standards and the tremendous impact which retroactivity would have upon the administration of justice.

For over seventy years, this Court has steadfastly adhered to the proposition that any prejudice resulting from a codefendant's admission or confession could be avoided by instructions to the jury. *E.g., Sparf v. United States,* 156 U.S. 51, 58 (1895); *United States v. Ball,* 163 U.S. 662, 672 (1896); *Opper v. United States, supra; Delli Paoli v. United States,* 352 U.S. 232 (1957). This same issue was presented to this Court in such recent cases as *Johnson v. New Jersey,* 384 U.S. 719, 735 (1966)[5] and *Gilbert v. California,* 388 U.S. 263, 268 (1967), where this Court declined to rule on the issue. Also, this Court endorsed the *Delli Paoli* rule in *Spencer v. Texas,* 385 U.S. 554, 562 (1967).

Yet in *Roberts,* this Court declared:

> ". . . The element of reliance is not persuasive, for Delli Paoli has been under attack from its inception, and many courts have in fact rejected it." *Id.,* at 295.

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[5] *Johnson v. New Jersey,* Brief and appearance of Counsel (Brief for Petitioner), 16 L. Ed. 2d 1327, 1328 (1967).

In *Bruton,* this Court stated that the *Bruton* holding was foreshadowed by *Jackson v. Denno,* 378 U.S. 368 (1964). Id., at 128-131.) But as late as January of 1967, this Court endorsed *Delli Paoli* in *Spencer* and in June of 1967 refused to reconsider *Delli Paoli* in *Gilbert.* Certainly, in light of *Gilbert* and *Spencer,* it would have been difficult to predict the demise of *Delli Paoli.*

The consequential reliance upon these decisions by state and federal prosecutors cannot be justly ignored: As stated in *Linkletter v. Walker,* 381 U.S. 618, 636 (1965), the past cannot always be erased by a new judicial declaration. Because of this, respondent suggests that this Court adopt a similar retroactivity ruling as in *Johnson v. New Jersey,* 384 U.S. 719, 733 (1966). If such a rule were adopted, then the cutoff time would be the date that this Court rendered its decision in *Bruton,* May 20, 1968.[6]

A failure to adopt such a rule would have a substantial impact upon the administration of justice. In California, there is a legislative policy in favor of joint trials. California Penal Code section 1098; *People v. Lara,* 67 Cal. 2d 365, 394, 62 Cal. Rptr. 586, 606 (1967). In *Spencer v. Texas, supra,* at 562, this Court recognized that there was a valid governmental interest in joint trials. As a result, many joint trials were tried under the old procedure. To now apply the new constitutional standard of *Bruton* to those cases would cause havoc in the administration of justice.

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[6]The trial in the instant case was tried in June and July of 1965. Respondent contends that in view of the state of law at the time of the trial, the trial court was eminently justified in relying upon *Delli Paoli.*

The beneficiaries of such a result would of necessity be those who acted in concert with other offenders; gang members and members of criminal conspiracies. Those persons who would derive the greatest benefit from a holding of compelled retroactivity are those felons under long-term sentences who have been confined over extended periods of time, since their cases would afford the least likelihood of a successful retrial. To require a general release of such prisoners would cripple the orderly administration of criminal law. We respectfully submit that this Court should hold that the rule established in *Bruton* is not available to retroactively attack a judgment of conviction.

Conclusion

We respectfully urge this Court to reconsider its retroactivity ruling in *Roberts v. Russell,* 392 U.S. 293 (1968). It is our feeling that the former procedure did not create a grave risk of convicting innocent defendants, thereby affecting the reliability of the fact-finding process. State and federal prosecutors have justifiably relied upon over seventy years of precedent by this Court holding that any prejudice resulting from a codefendant's statement can be cured by instructions to the jury. To apply the new constitutional standard of *Bruton v. United States,* 391 U.S. 123 (1968) to cases tried under the old procedure would cause havoc in the administration of justice.

The extrajudicial statements of the three codefendants do not fall within the ban of *Bruton.* Since

Rhone was cross-examined by petitioner Harrington's counsel, the admission of Rhone's confession does not violate petitioner's Sixth Amendment rights. The extrajudicial statements of Bosby and Cooper only refer to a "male white," "Caucasian," etc. and do not necessarily implicate petitioner Harrington. In fact, the description of the white man in Bosby's statement does not fit petitioner Harrington.

The vast majority of the cases which have discussed the issue have held that the *Bruton* rule is subject to a harmless error standard. Both logic and sound policy support the majority view. There are significant variables in each extrajudicial statement with respect to their inculpating effect and whether they added critical weight to the prosecution's case.

Under the harmless error standard enunciated in *Chapman v. California,* petitioner Harrington was not prejudiced by the admission of the three codefendants' extrajudicial statements. As noted before, petitioner Harrington was not denied his Sixth Amendment right of confrontation to codefendant Rhone's confession since Rhone testified in his own defense and was cross-examined by petitioner Harrington's trial counsel. The extrajudicial statements of Bosby and Cooper were extremely limited in detailing the white man's role in the robbery. In view of the lack of specificity in the statements of the latter two codefendants and the exceedingly strong prosecution evidence, the admission of these statements was harmless as to petitioner Harrington.

For the foregoing reasons, the judgment of conviction should be affirmed.

Dated: Los Angeles, California, February 1, 1969.

Respectfully submitted,

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Attorneys for Respondent.

APPENDIX.

United States Constitution.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code.

Title 28

28 U.S.C. § 1257 (1964), 62 Stat. 929 (1949)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 2111 (1964), 63 Stat. 105 (1949).

Rhone was cross-examined by petitioner Harrington's counsel, the admission of Rhone's confession does not violate petitioner's Sixth Amendment rights. The extrajudicial statements of Bosby and Cooper only refer to a "male white," "Caucasian," etc. and do not necessarily implicate petitioner Harrington. In fact, the description of the white man in Bosby's statement does not fit petitioner Harrington.

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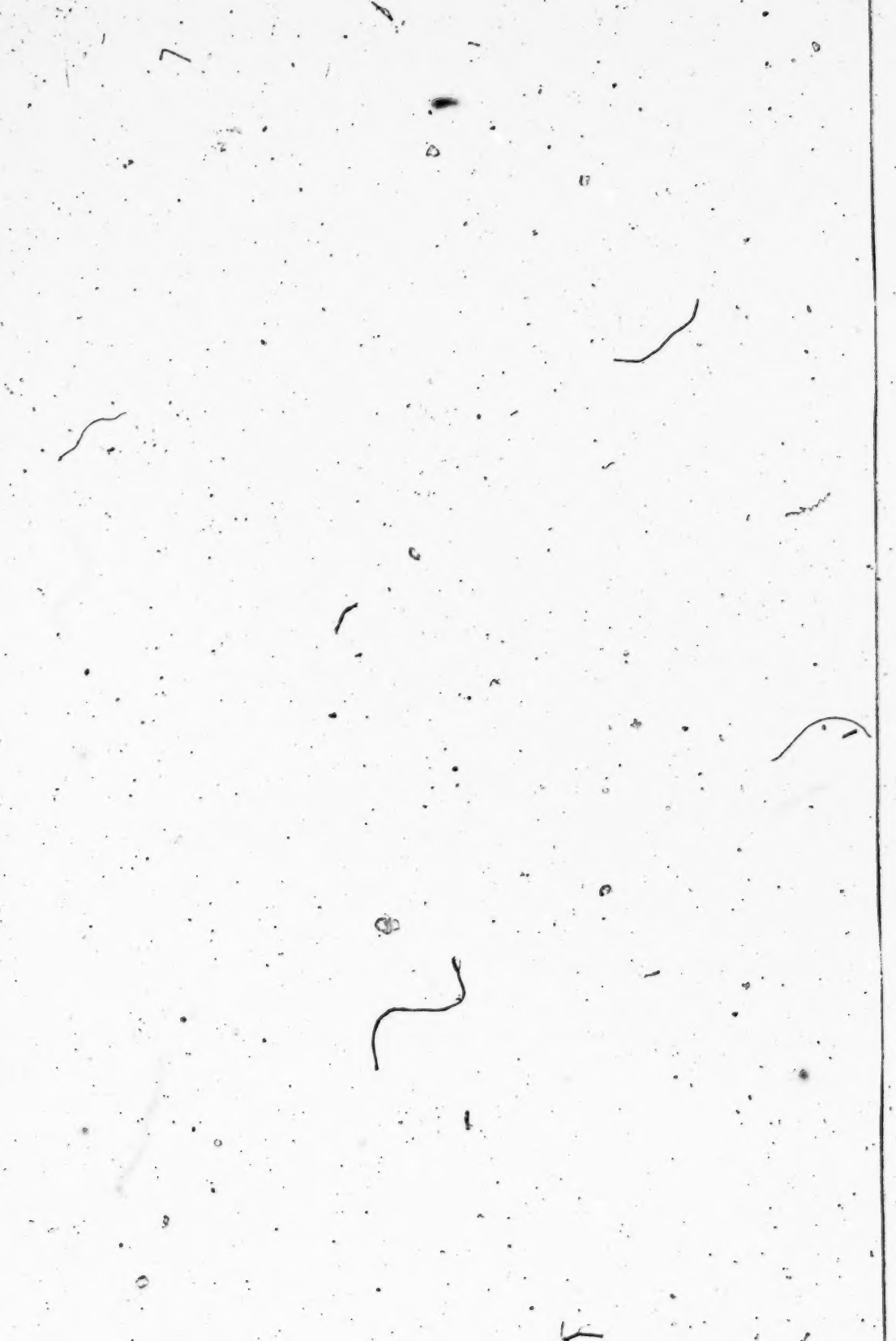

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 750

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF FOR THE PEOPLE OF THE STATE OF ILLINOIS, Amicus Curiae

INTEREST OF THE AMICUS CURIAE

Responsible prosecutors in virtually every state and federal jurisdiction are vitally concerned with the impact of *Bruton* v. *United States,* 391 U.S. 123 (1968), upon convictions secured prior to the date of the *Bruton* decision.

In this case petitioner Harrington would have this Court widen the impact of *Bruton* to disastrous breadths by (a) finding a *Bruton* error even where the defendant has been

afforded the right of confrontation (b) refusing to apply a harmless error rule or applying one so stringent as to create an impossible burden for the prosecution, while (c) persisting in its determination in *Roberts* v. *Russell,* 392 U.S. 293 (1968), that *Bruton* is to be applied retroactively to the States.

The Illinois experience in the wake of *Bruton* may be of value to this Court in light of the fact that the Illinois law was only slightly less stringent than that enunciated in *Bruton.* See *People* v. *Wilson,* 29 Ill. 2d 82, 193 N.E. 2d 449 (1963).

This experience demonstrates that the severest problems are created when *Bruton* is applied to convictions secured prior to the date *Bruton* was decided.[1] It indicates that *Bruton* must be limited in one or more ways: by overruling *Roberts* v. *Russell;* by limiting *Bruton* to cases where the co-defendant does not testify; or by applying a sensible harmless error rule which does not require reversal where there is no doubt of guilt.

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1. This is not to say that the application of *Bruton* to pending trials is without problems. The expense of separate trials is very heavy but the heaviest cost the society has to bear is the inconvenience borne by citizen witnesses and their resulting resentment and lack of confidence in the courts. In one typical case within counsel's experience, a shopkeeper was robbed by four men. Their statements resulted in the necessity of holding three trials. At the end of the second trial the shopkeeper, who had testified twice and would have to testify again, remarked to the prosecutor that, in the end, the courts would take more money from him than did the thieves.

ARGUMENT

I.

BRUTON V. UNITED STATES SHOULD NOT BE EXTENDED TO CASES IN WHICH THE CONFESSING DEFENDANT TESTIFIES AND IS AVAILABLE FOR CROSS-EXAMINATION BY HIS CO-DEFENDANT.

In considering whether *Bruton* v. *United States,* 391 U.S. 123 (1968), should be retroactive, this Court was required to estimate the potential impact of a retroactive application upon the orderly administration of criminal justice. *Linkletter* v. *Walker,* 381 U.S. 618, 636-38 (1965); *Stovall* v. *Denno,* 388 U.S. 293, 300 (1967). Unless the impact is to be recalculated and the decision in *Roberts* v. *Russell,* 392 U.S. 293 (1968), is to be reconsidered, it is critically important to limit *Bruton* to precisely what it held. In short, if the decision is made that the retroactive impact will not be so great as to require prospective-only application, the impact must not be broadened by a decision interpreting *Bruton* in a way unjustified by the *Bruton* opinion itself.

The *Bruton* decision specifically rests upon the right of confrontation. Again and again this Court emphasized that the prejudice occurred because the confessing co-defendant did not testify and subject himself to cross-examination, 391 U.S. 123, 125, 131-132, 134-135, 137. Heavy reliance was placed upon the Advisory Committee's comment to Federal Rule of Criminal Procedure 14: "This prejudice cannot be dispelled by cross-examination *if the co-defendant does not take the stand.*" 18 U.S.C.A. Rules 1-31 (1966 Revision) (emphasis supplied).

This was the rule of *Bruton* v. *United States* which was held retroactive—and no other. This was what led the Illinois Supreme Court to join the vast majority of other jurisdictions in holding *Bruton* inapplicable where the co-defendant testifies and subjects himself to confrontation and cross-examination:

> In *Bruton* the co-defendant Evans did not testify, but his out-of-court confession inculpating *Bruton* was introduced into evidence. The United States Supreme Court, in overruling the *Delli Paoli* case (352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294), held that because of the substantial risk that the jury, despite cautionary instructions to the contrary, would look to the incriminating extra-judicial statements in determining defendant Bruton's guilt, admission of Evans' confession violated Bruton's right of cross-examination secured by the confrontation clause of the sixth amendment. The Court stated at p. 126: "Plainly the introduction of Evans' confession added substantial, perhaps even critical, weight to cross-examination, *since Evans did not take the stand.* Petitioner thus was denied his constitutional right of confrontation" (italics added). It is evident from that statement reflecting the basis of the *Bruton* decision that the facts in *Bruton* are distinguishable, and the constitutional rights protected there are in no way involved in this case.
>
> Unlike the *Bruton* case, co-defendant Langusch did take the stand. . . .
>
> Thus defendants were not subjected to the risk of extra-judicial inculpating statements of a co-defendant, or deprived of any right of confrontation or cross-examination as involved in *Bruton.*

People v. Somerville, —— Ill. 2d ——, —— N.E. 2d —— (No. 40813, January 22, 1969).[2]

For a recent case to the same effect, see *Clark v. State,* 4 Cr. L. Rptr. 2450-51 (Md. Ct. Spcl. App., February 11, 1969).

In the instant case before the Court, the defendant Rhone, whose statement was the only one identifying petitioner Harrington by name, took the witness stand and gave extensive testimony concerning both the crime and his prior statement on direct examination (App. 384-90), on cross-examination by the prosecution (App. 390-403), on redirect (App. 403-405), and upon examination by the Court (App. 404-411). At that point the trial was recessed to give Rhone a chance to read a copy of the statement he made to the police and to resume the stand, if he chose. Rhone resumed the stand and testified under examination by the Court (App. 413-416). He was then cross-examined by counsel for defendant Bosby (App. 416-19) and by counsel for petitioner (App. 419-20). Under these circumstances the confrontation rationale of *Bruton* cannot apply.

II.

A SENSIBLE HARMLESS ERROR RULE SHOULD BE APPLIED WHERE VIOLATIONS OF BRUTON V. UNITED STATES HAVE OCCURRED.

Under *Delli Paoli* v. *United States,* 352 U.S. 232 (1957), the practice of admitting, subject to a cautionary instruc-

2. The opinion in *People* v. *Scott,* 100 Ill. App. 2d 433, 241 N.E. 2d 579 (1968), cited by respondent California (Brief p. 11), no longer represents Illinois law. The respondent could not have known this since the *Somerville* opinion is still unreported.

tion, the confession of a non-testifying defendant which implicates a co-defendant was considered *per se harmless.* Now Petitioner Harrington would have this Court deem the practice to be *per se harmful* and apply it to cases tried in an era when the practice was considered harmless.

The argument that *Bruton* v. *United States,* 391 U.S. 123 (1968), should not be subject to a federal harmless error rule comes too late. In *Gilbert* v. *California,* 388 U.S. 263 (1967), this Court clearly, albeit indirectly, decided that what is now known as a *Bruton* error could be harmless under the standard previously announced in *Chapman* v. *California,* 386 U.S. 18 (1967).

The California Supreme Court in *People* v. *Gilbert,* 63 Cal. 2d 690, 408 P. 2d 365, 371, 372 (1965), had been faced with the identical situation which later arose in *Bruton:* A's confession was *improperly* admitted against A. It contained references to B. The jury was cautioned not to consider A's confession as evidence against B. Following its decision in *People* v. *Aranda,* 63 Cal. 2d 518, 407 P. 2d 265 (1965), a precursor of *Bruton,* the California court held that the admission of the confession was error as to B, despite the cautionary instruction. However, the California court held that the error was harmless under a harmless-error rule comparable to the *Chapman* standard.

The case reached the United States Supreme Court just a short time before *Bruton.* This Court held that even if *Delli Paoli* were no longer good law (as it is clear from *Bruton* a majority of the Court believed), no reversible error was involved because the California Supreme Court had applied a harmless error rule which satisfied the requirements of *Chapman.* Hence, the Court implicitly decided that what is now known as a *Bruton* error can under

some circumstances be deemed harmless even under the federal standard.

The real problem faced by Illinois courts, and by others which consider it their duty to faithfully comply with the commands of this Court, is a dictum in *Chapman* v. *California,* 386 U.S. 18, 23 (1967) which seems to suggest that other "overwhelming evidence" is not to be an important factor in determining whether a particular constitutional error should be deemed harmless.

Thus in *People* v. *Smith,* 38 Ill. 2d 13, 17, 230 N.E. 2d 188, 191 (1967), in reversing a conviction because of a violation of the right to confrontation, the Illinois Supreme Court said that *Chapman* held that the "test of whether error is harmless is not whether there is other evidence of guilt or even whether other proof of guilt is overwhelming."

We respectfully submit that lower courts must be freed from the bonds of the dictum in *Chapman.* Any rational harmless error rule, whether applied in civil cases or in criminal cases, whether the error is of constitutional or of non-constitutional dimensions—must make the weight of the properly admitted evidence a highly relevant factor in making the calculation of whether the error was harmful. This is especially true where the error was committed in good faith reliance upon a then prevailing decision.

Subsequent to *Chapman* both this Court and lower federal courts have recognized this in criminal cases involving error of a constitutional dimension. For example, in remanding *Wade* v. *United States,* 388 U.S. 218, 242 (1967), this Court indicated that if the in-court identification was found to be tainted by the constitutionally infirm line-up identification, the trial court would then be required to determine whether the error was harmless

according to the *Chapman* standard. In other words, the constitutionally improper admission of an eye-witness identification—despite its obvious probative force, which no jury could simply ignore—*could* under some circumstances meet the federal constitutional standard for harmless error. This obviously would only be so because the rest of the evidence was, by itself, overwhelming, so that a guilty finding was the only proper verdict.

The Court in *Gilbert* v. *California,* 388 U.S. 263, 268 (1967), even more specifically indicated that the overwhelming nature of the other evidence is highly relevant to a determination of whether a constitutional error can be deemed harmless. There the Court was satisfied that what later came to be known as a *Bruton* error was harmless. However, since evidence of the out-of-court identification had been improperly admitted, the Court directed that upon remand the significance of the error should be recalculated since once evidence of the line-up was suppressed, the case had become weaker. In other words, the harmfulness of the *Bruton* error depended upon the strength of the rest of the government's case.

Other federal courts in a variety of post-*Chapman* case involving violation of federal constitutional rights have been satisfied that the errors were harmless. The standards they have emphasized are (1) the cumulative nature of the erroneously admitted evidence, that is proof of the same fact by two means, only one of which is improper and (2) the weight of evidence establishing other facts which abundantly demonstrate guilt. See for example:

Ware v. *United States,* 376 F. 2d 717, 718-19 (7th Cir. 1967), violation of right to confrontation held harmless;

McKissick v. *United States;* 379 F. 2d 754, 762 (5th Cir. 1967), violation of right to confrontation said to be among violations which could be harmless;

United States v. *Reed*, 392 F. 2d 865, 867 (7th Cir. 1968) and *Thompson* v. *United States*, 382 F. 2d 390, 394 (9th Cir. 1967), physical evidence unlawfully seized and introduced held subject to the harmless error rule of *Chapman*;

Boeckenhaupt v. *United States*, 392 F. 2d 24, 28 (4th Cir. 1968), application of the harmless-error rule to improper comment at trial on the defendant's decision to invoke the Fifth Amendment self-incrimination privilege;

United States v. *Barnes*, 383 F. 2d 287, 295 (6th Cir. 1967), deeming harmless a constitutional violation related to pretrial publicity.

In short, the People of the State of Illinois urge that this Court make clear what is implicit in its decisions in *Wade* and *Gilbert* and in the decisions of the federal circuit courts: convictions should not be upset if the reviewing court in considering all properly admitted evidence finds no doubt about the appellant's guilt.

The alternative is slavish adherence to the dictum in *Chapman* which led to the very unfortunate result in *People* v. *Armstrong*, 41 Ill. 2d 390, 243 N.E. 2d 825 (1968), where the Illinois Court, having been cited to its interpretation of *Chapman* in *People* v. *Smith*, 38 Ill. 2d 13, 17, 230 N.E. 2d 188, 191 (1967), *supra*, without mentioning *Chapman* or *Smith*, felt itself "forced" to reverse because of a *Bruton* error. In Armstrong four eye witnesses positively identified Armstrong as the fellow in a brown jacket who held a shotgun while robbing three taverns in the same vicinity within a forty-five minute period. Two of these witnesses had watched while Armstrong fired his shotgun and while a companion fired a pistol, killing a patron in the course of the third robbery. It was undisputed that the patron, an off-duty policeman, had been able to return one shot before dying. It was

also undisputed that Armstrong had been wounded on the night in question. Armstrong's companions, Sumlin and Rhodes, were also positively identified by the witnesses. This was probative against Armstrong, since a friend of Armstrong testified that Armstrong had left a certain apartment with Sumlin and Rhodes prior to the crime spree and had returned with them just after the shooting. This same friend saw Armstrong with a shotgun and a pistol just after the shooting. The next day the weapons were found in Armstrong's apartment. Expert testimony proved that the fatal shot came from one of the weapons found in Armstrong's apartment.

In the face of all this evidence, defendant Armstrong, like his co-defendants, offered no defense and no alibi. It is fair to say that he was merely putting the State to its proof and gambling (successfully) that the jury would not recommend the death penalty, after findings of guilty. Considering the relative ages of the defendants and the prior criminal record of Armstrong, the trial judge adjudged Armstrong "the most culpable under all the circumstances" and imposed upon him the stiffest sentence.

Under the compulsion of *Bruton* and *Chapman* the Illinois Supreme Court reversed as to Armstrong because his friend testified that one of the co-defendants, while Armstrong was in another room immediately after the shooting, mentioned the shooting and implicated Armstrong. See *People* v. *Armstrong,* 41 Ill. 2d 390, 243 N.E. 2d 828 (1968), and the companion case, *People* v. *Rhodes,* 41 Ill. 2d 494, 244 N.E. 2d 145 (1969).

As a result while the less culpable defendants are serving lengthy prison terms for their participation in the felony-murder, no one having the slightest doubt about their guilt, their leader and companion Armstrong—whose

guilt has been established to a moral certainty—will go unpunished for his murder unless the State can gather together its evidence, some of which is stale, and secure a new conviction.

Thus even though Illinois recognizes that a *Bruton* error could be harmless [see *People* v. *Armstrong*, 41 Ill. 2d 390, 243 N.E. 2d 825, 831 (1968)] the federal harmless error rule, because of a dictum in *Chapman*, is so stringent as to result at least in a waste of resources and possibly in a miscarriage of justice.

This Court should carefully enumerate the factors to be considered in determining whether an error is harmless. The overwhelming weight of evidence of guilt is clearly an element militating against a finding of reversible error. If the offending piece of evidence is merely cumulative, that fact is also significant. And of great significance is the nature of defense offered by the defendant. If, as was the case in Armstrong and as is the case with Harrington (App. 384-86), the defendant does no more than put the State to its proof, a Court should be extremely reluctant to find harmful an error in the admission of evidence if there is other persuasive evidence of guilt.

The resolution of problems of harmless errors neither yields to nor requires abstractions or verbal totems. A reviewing court has the complete record of trial before it and ask itself only whether, excluding the improper evidence, the verdict of guilty was fair and proper and supported by the overwhelming weight of evidence. When all the evidence is before the court, no abstractions are necessary. The application of simple common-sense rules will do. And a rule which does not consider either the overwhelming weight of evidence or the nature of the

defense is devoid of common sense. This Court should announce that *Chapman* v. *California* is applicable to *Bruton* errors and that it is not to be interpreted to require reversal where the properly admitted evidence is so overwhelming as to leave no doubt about guilt.

III.

THE DOCTRINE OF BRUTON V. UNITED STATES SHOULD BE APPLIED PROSPECTIVELY ONLY AND ROBERTS V. RUSSELL SHOULD BE RECONSIDERED AND OVERRULED.

Even if *Bruton* v. *United States,* 391 U.S. 123 (1968), is not distorted to extend to cases where the confessing co-defendant testifies, and even if this Court fulfills its promise in *Gilbert* to apply a sensible harmless-error to *Bruton* errors, the impact of a retroactive application of *Bruton* will be significant. *Roberts* v. *Russell,* 392 U.S. 293 (1968), should be reconsidered. The issue is simply too important to be resolved in a per curiam decision without the issues being fully and adequately briefed and argued.

The cornerstone of the "prospective-only" doctrine—in overruling prior precedents in the common-law, in changing long-standing interpretations of statutes, and in rejecting prior decisions in the field of constitutional criminal procedure—is justifiable reliance upon the old decisions. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 502-03 (1968). Cardozo, Address, 55 Rep. N.Y. State Bar Assn. 263, 294 (1932).

To say that reliance is not justifiable because the old decision was under attack—as this Court said in *Roberts* v. *Russell,* 392 U.S. 293, 295, is to ignore the entire history

of the "prospective-only" doctrine. The classic example of that doctrine's use is as an accompaniment to decisions abolishing immunity for charitable organizations or for the sovereign. See for example, *Darling* v. *Charleston Community Hospital,* 33 Ill. 2d 326, 211 N.E. 2d 253 (1965). Such abolition *always* has occurred only after many years of repeated attacks upon the old rule of immunity. Yet courts have not, therefore, concluded that reliance upon the old rule was unjustified so as to preclude the invocation of the prospective-only doctrine.

Wolf v. *Colorado,* 338 U.S. 25 (1949), was under strong attack in the decade which followed that decision. Nearly half of the States had adopted exclusionary rules. See *Linkletter* v. *Walker,* 367 U.S. 618, 633 (1965). Yet it was the overruling of *Wolf* which first prompted this Court to use the justifiable reliance doctrine in order to make prospective-only a decision in the area of the Bill of Rights. The number of states which had completely rejected *Delli Paoli* before *Bruton* is insignificant in itself and by comparison to the number which had rejected *Wolf* before *Mapp* v. *Ohio,* 367 U.S. 643 (1961), was decided.

Indeed, the tenor of the state opinions rejecting *Delli Paoli* indicates that the State considered the rule to be purely federal in scope. Those jurisdictions which relied on *Delli Paoli* had a double reason to do so. The first was that *Delli Paoli* was in accord with state law and the second was that, even if *Delli Paoli* were not in accord, the federal rule would not govern state procedure.

The opinion in *Roberts* v. *Russell* apparently concedes that larger numbers of convictions will be affected by a retroactive application of *Bruton.* Compared to the numbers involved in a retroactive application of *Bloom* v. *Illinois,* 391 U.S. 194 (1968), the number of cases here in-

volved is huge. See *DeStefano* v. *Woods*, 392 U.S. 631 (1968). We would add only that the kinds of cases affected are likely to involve serious crimes and professional criminals. *Bruton* benefits only criminals who have acted in concert with others to perform their wicked deeds. Certainly convictions in major federal cases—where multiple defendants were the order of the day—are jeopardized by *Roberts* v. *Russell*. Important state convictions are also at stake. For instance, in an appeal now pending, *Bruton* is being used as a basis for attacking one of the most important convictions ever secured against organized crime by state and local officials in Illinois. *People* v. *Bravos*, et al. (No. 52545, Illinois Appellate Court, First District).

Finally the People of the State of Illinois respectfully take issue with the Court's suggestion that the practice followed in *Delli Paoli* undermines the reliability of the adjudication of guilt. Rather, we are dealing with a voluntary confession of A which implicates B. The confession was admitted only because it had the reliability of a voluntary statement and had probative value against A. In short, it is much like a voluntary confession given without *Miranda* warnings. Just as *Miranda* was held non-retroactive because the statements admitted in pre-*Miranda* trials were not unreliable, so also should *Bruton* be held non-retroactive because, even if the jury considered the statements in question as evidence against a non-confessing co-defendant, the statements that they considered were reliable evidence. Like *Mapp* and *Miranda*, in the interest of promoting other values, *Bruton* defeats truth more often than it promotes it. This is precisely what Justice Learned Hand meant when he said that although the kind of practice involved in *Delli Paoli* rests upon a fiction, that practice "probably furthers, rather

than impedes, the search for truth . . ." *Nash* v. *United States,* 54 F. 2d 1006, 1007 (2nd Cir. 1932). This is precisely what the California Supreme Court, which reached the "*Bruton* result" before your Honors overruled *Delli Paoli,* stated: "Our ruling (in *Aranda*), however, did not stem from a belief that the former procedure created a grave risk of convicting innocent defendants . . ." *People* v. *Charles,* 57 Cal. Rptr. 745, 425 P. 2d 545, 547 (1967).

Under very recent decisions of this Court, where the reliability of past convictions is not in doubt, a new decision should not be given retroactive effect. *Linkletter* v. *Walker,* 381 U.S. 618, 637-38 (1965); *New Jersey* v. *Johnson,* 384 U.S. 719, 728-29 (1966); *Stovall* v. *Denno,* 388 U.S. 293, 295 (1967).

CONCLUSION

The People of the State of Illinois, as amicus curiae, respectfully request that the judgment of the California Court of Appeal in the instant cause be affirmed.

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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 750

GLENN MARTIN HARRINGTON,
Petitioner,

against

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF THE STATE OF NEW YORK JOINED BY THE STATES OF ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, KENTUCKY, MINNESOTA, MONTANA, NEW MEXICO, NORTH CAROLINA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA AND WASHINGTON, AS *AMICI CURIAE*

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF THE STATE OF NEW YORK JOINED BY THE STATES OF ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, KENTUCKY, MINNESOTA, MONTANA, NEW MEXICO, NORTH CAROLINA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA AND WASHINGTON, AS *AMICI CURIAE*

Interest of *Amici*

This case presents the Court with its first opportunity to discuss the scope of its decisions of last term in *Bruton* v. *United States*, 391 U. S. 123 and *Roberts* v. *Russell*, 392 U. S. 293. In overruling *Delli Paoli* v. *United States*, 352 U. S. 232 and in making that holding retroactive and applicable to the states, these cases have affected a substantial number of past convictions and pending trials

all over the United States and, thus, have a profound effect on the administration of justice in every jurisdiction in the country.

The brief of the California Attorney General thoroughly discusses the facts in this particular case which demonstrate that petitioner's conviction was not unconstitutional and we therefore join in that brief, adopt its arguments and support its position. The purpose of this brief is to discuss the scope of the rule enunciated in *Bruton* and the judicial standards to be employed in enforcing it.

The California Attorney General urges this Court to apply a harmless error rule to *Bruton* cases. Since the decision below rests on a holding of harmless error under state law, California has a special concern with the applicability of *Chapman* v. *California,* 386 U. S. 18. It is our position that the appropriate standard to determine whether there has been a violation of a defendant's right to a fair trial is whether there is a substantial risk of prejudice created by the introduction of a confession at a joint trial. Since that standard requires a weighing of all the aspects of the trial before error is found in the first place, the harmless error standard would not usually be pertinent.* However, if this Court holds that *Bruton* creates a *per se* rule prohibiting joint trials where confessions are introduced, it certainly should not disturb a case where the error did not harm the other defendant.

In any event, the argument in the California brief relating to harmless error also supports a due process interpretation of *Bruton* and *Roberts.*

The California Attorney General also argues that this Court should reconsider its decision in *Roberts* v. *Russell* to the extent that it holds *Bruton* retroactive. We join

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* However, if a trial Court were to err in assessing the potential risk of prejudice and denying a severance, an Appellate Court might find that, under the particular facts at trial, the risk did not develop and thus the error was harmless.

in that request and adopt the brief of the California Attorney General on this issue.

The interest of the Attorney General of the State of New York is substantial. As chief legal officer of the State of New York (New York Executive Law § 63), he is charged with maintaining a fair balance between effective law enforcement to protect society against crime and observance of due process in the administration of justice. As a prosecuting officer in specified areas of criminal conduct, and as an advisor to the District Attorneys and to the judicial officers of the State, the Attorney General is concerned with the huge volume of criminal cases handled by the New York courts and with the fact that a great many cases will be affected by this Court's decision regarding the scope of *Bruton*.*

In addition, the New York Attorney General, as counsel to the officers of the state correctional institutions who are named as respondents in habeas corpus proceedings, is concerned with the seriously disruptive effects upon the administration of justice which would inevitably flow from a retroactively applied broad condemnation of joint trials.

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* At least 16 New York convictions have recently been reversed and retrials ordered because of *Bruton*, to wit:

People v. *Mirenda*, —— N. Y. 2d ——, vol. 30 No. 16 L. Rep. News January 29, 1969 (N. Y. Ct. App. dec'd January 9, 1969); *People* v. *Baker*, 23 N. Y. 2d 307 (1968); *People* v. *Pohl*, 23 N. Y. 2d 290 (1968); *People* v. *Cefaro*, 23 N. Y. 2d 283 (1968); *People* v. *Jackson*, 22 N. Y. 2d 446 (1968); *People* v. *Boone*, 22 N. Y. 2d 76 (1968); *People* v. *Campbell*, —— App. Div. 2d (2d Dept., decided March 26, 1969) N.Y.L.J., March 27, 1969 p. 16, col. 7; *People* v. *Weis*, 30 A. D. 2d 877 (2d Dept. 1968); *People* v. *Burwell*, 30 A. D. 2d 842 (2d Dept. 1968); *People* v. *Bastone*, 30 A. D. 2d 828 (2d Dept. 1968); *People* v. *Cassidy*, 30 A. D. 2d 795 (1st Dept. 1968); *People* v. *McKendall*, 30 A. D. 2d 717 (3rd Dept. 1968); *People* v. *Pilon*, 30 A. D. 2d 365 (3rd Dept. 1968); *People* v. *Balatnicov, et al.*, N.Y.L.J., 1/28/69, p. S12, col. 4 (N. Y. Co. Sup. Ct.); *United States ex rel. LaBelle* v. *Mancusi*, 404 F. 2d 690 (2d Cir. 1968); *United States ex rel. Joseph* v. *LaVallee* (N.D.N.Y. FOLEY, D.J.) dec'd September 24, 1968) *appeal pending* 2d Cir., Docket No. 32950.

The other Attorneys General subscribing are charged with similar duties and are equally concerned. Mindful of the importance of this issue to the administration of justice in every state, the states of Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Minnesota, Montana, New Mexico, North Carolina, South Carolina, South Dakota, Utah, Virginia and Washington join the State of New York in presenting their position in this brief *amici curiae* filed with the Court pursuant to Rule 42.

Question Presented

What is the standard for assessing claims alleged to arise under the decisions of this Court in *Bruton* v. *United States,* 391 U. S. 123 and *Roberts* v. *Russell,* 392 U. S. 293?

ARGUMENT

Claims alleged to arise under *Bruton* v. *United States,* 391 U. S. 123 and *Roberts* v. *Russell,* 392 U. S. 293, should be judged by a standard requiring a determination that the introduction of a co-defendant's confession created a substantial risk of prejudice and not by a *per se* rule that the introduction of such a confession automatically vitiates the conviction.

The impact of the decisions of this Court in *Bruton* v. *United States,* 391 U. S. 123 and *Roberts* v. *Russell,* 392 U. S. 293, has been resounding in virtually every federal and state court in the country. The overruling of *Delli Paoli* v. *United States,* 352 U. S. 232, in a holding both retroactive and applicable to the States has required almost all jurisdictions to reconsider their past joint trials and their standard for severance of future trials. However, because of the extreme factual pattern of *Bruton* and the limited and rigid nature of the rule it struck down, there are no adequate guidelines for coping with the welter of

factual considerations generated by the cases. Accordingly, the instant case, insofar as it presents an opportunity for enunciating those guidelines, is of major importance to judicial administration. See *Johnson* v. *New Jersey*, 384 U. S. 719, 734.

The basic standard suggested by *Bruton* and *Roberts* for measuring the fairness of a trial in which one co-defendant's statement implicating another was or may be introduced is whether such introduction creates a substantial risk that the jury did or would consider the confession against the implicated defendant, thus prejudicing his right to a fair trial. The method of applying this standard to present and past cases will differ, but the essential conclusion of substantial risk is the same.

At the very least, the standard of substantial risk should be applied to past cases tried before May 20, 1968, the date of this Court's decision in *Bruton* as was done in *Stovall* v. *Denno*, 388 U. S. 293. To give meaning to the right of confrontation at trial, this Court created the right to counsel at the out-of-court identification in *United States* v. *Wade*, 388 U. S. 218 and *Gilbert* v. *California*, 388 U. S. 263. That rule was not applied to confrontations which had already occurred unless the violation was so substantial as to deprive the defendant of his right to due process of law. *Stovall* v. *Denno*, *supra*.

Petitioner nevertheless claims that *Bruton* states a *per se* rule presumably requiring vacation of any conviction whenever, at trial, a confession from a non-testifying co-defendant implicated the other defendant.* While some language in *Bruton* might support such a rule, the case as a whole does not and *Roberts* v. *Russell* conclusively lays the notion to rest. The genesis of *Bruton* is in *Delli Paoli*

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* Such a rule would apparently require either (1) separate trials; (2) not introducing the implicating confession; or, where possible, (3) redaction of the confession to exclude reference even to the existence of a cohort.

v. *United States* in which this Court upheld a conviction even though a co-defendant's confession implicating Delli Paoli had been admitted into evidence against the confessor with limiting instructions to that effect, the Court saying that it could "fairly proceed on the basis that the jury followed these instructions" (352 U. S. at 241). Although *Delli Paoli* itself did not speak in absolute terms (352 U. S. at 243), its progeny did until, as the Solictor General conceded in *Bruton*, the strain became to great (see 392 U. S. at 126).

In *Bruton*, the co-defendant Evans confessed that he and Bruton had committed an armed robbery. On appeal from the judgment of conviction it was held that Evans' confession had been erroneously admitted against him at trial. Apart from the confession of Evans, the only evidence against both defendants was identification testimony. That evidence as against Bruton was a great deal weaker than it had been against Evans. *Evans* v. *United States*, 375 F. 2d 355 (8th Cir. 1967). Yet on retrial, even Evans was acquitted. In the face of these facts, this Court reversed the conviction of *Bruton* and overruled the "basic premise" of *Delli Paoli* that the jury must always be presumed to follow limiting instructions of the sort given in the *Bruton* case.

The elimination of one irrefutable presumption should not, however, lead this Court to substitute another. The effect of *Bruton* is not to change the standards for measuring the fairness of a trial, but to radically readjust the weight to be given the cautionary instruction as one factor in judging that fairness. The decision did not hold that such instruction was inevitably ineffective, let alone require the rule urged by petitioner. Thus, the Court stated:

> "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances oc-

cur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' *Lutwak* v. *United States*, 344 U. S. 604, 619; see *Hopt* v. *Utah*, 120 U. S. 430, 438; cf. Fed. Rule Crim. Proc. 52(a). It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in *Jackson* v. *Denno*, *supra*, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt* v. *Utah*, *supra*; *Throckmorton* v. *Holt*, 180 U. S. 552, 567; *Mora* v. *United States*, 190 F. 2d 749; *Holt* v. *United States*, 94 F. 2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitable suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame into others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination."

That this balancing of facts represents the holding of *Bruton* was shown in *Roberts* v. *Russell*, *supra*, where the Court, indeed, quoted a part of this passage as representing the *Bruton* rule (392 U. S. at 294-5) and did not refer to the broad language relied on by petitioner. Moreover, although the Court held that the facts in *Roberts* "parallel"

the facts in *Bruton*, it did not require that the writ of habeas corpus issue but instead remanded the case to the District Court "for further consideration in light of *Bruton* v. *United States, supra.*" This disposition must indicate that there were factors which could distinguish the case from *Bruton*, although that case too, involved the implication by one defendant of another.

The very fact that *Bruton* was so perfunctorily held retroactive in *Roberts* v. *Russell*, demonstrates that the rule in *Bruton* was not of as broad a scope as petitioner contends. When this Court sets strict rules for criminal trials, it has held them not to be retroactive. See *Linkletter* v. *Walker*, 381 U. S. 618 (limiting the effect of *Mapp* v. *Ohio*, 367 U. S. 643); *Tehan* v. *Shott*, 382 U. S. 406 (limiting the effect of *Griffin* v. *California*, 380 U. S. 609); *Johnson* v. *New Jersey, supra* (limiting the effect of *Miranda* v. *Arizona*, 384 U. S. 436 and *Escobedo* v. *Illinois*, 378 U. S. 478); *Stovall* v. *Denno, supra* (limiting the effect of *United States* v. *Wade, supra* and *Gilbert* v. *California, supra*); *DeStefano* v. *Woods*, 392 U. S. 631 (limiting the effect of *Duncan* v. *Louisiana*, 391 U. S. 145 and *Bloom* v. *Illinois*, 391 U. S. 194); *Fuller* v. *Alaska*, 393 U. S. 80 (limiting the effect of *Lee* v. *Florida*, 392 U. S. 378; *Desist* v. *United States*, —— U. S. —— (#12 Oct. Term 1968, decided March 24, 1969) 37 L. W. 4225 and *Kaiser* v. *New York*, —— U. S. —— (#62 Oct. Term 1968, decided March 24, 1969) 37 L. W. 4236 (limiting the effect of *Katz* v. *United States*, 389 U. S. 347).

In *Roberts* v. *Russell*, it was stated that the practice prohibited in *Bruton* seriously impaired the integrity of the fact-finding process. 392 U. S. 293, 294. By comparison, this Court contemporaneously found that the failure to provide a jury trial did not so substantially impair the integrity of the fact-finding process. *DeStefano* v. *Woods, supra.* Therefore the practice found so dangerous in *Roberts* must be related to an assessment of the extreme facts of *Bruton.*

It should also be pointed out that *Bruton* must to some extent involve, not only the constitutional right of confrontation, but also the supervisory power of this Court over the lower federal courts. This is highlighted by the fact that *Delli Paoli,* also a federal case, dealt with the question whether or not the conviction should be reversed in the exercise of supervisory power. Thus, even if this Court were to enunciate a *per se* rule for the federal courts, it would not preclude the more flexible standard with respect to state judgments of conviction we have suggested.

The skepticism regarding the jury's ability to follow instructions evidenced by this Court's decision in *Bruton* finds its roots in decisions in complex federal joint conspiracy trials involving a conglomeration of conspiracy and substantive counts unevenly charged against many co-conspirators. Indeed, Judge Learned Hand's graphic phrase "mental gymnastic" (*Nash* v. *United States,* 54 F. 2d 1006 [2d Cir. 1932]), was meant to apply to such cases (*United States* v. *Delli Paoli,* 229 F. 2d 319, 321 [2d Cir. 1956]), where instructions must regulate whether each piece of evidence which directly implicates one defendant may or may not be used against each of the others. Even Judge Frank's eloquent dissent in *United States* v. *Delli Paoli, supra* at 323 refers to the special problems of these complicated federal cases (e.g., *United States* v. *Haupt,* 136 F. 2d 661 [7th Cir. 1943]), rather than to a joint substantive crime prosecuted in the state courts as is presented here.

The argument that *Bruton* has enunciated a *per se* rule for past, as well as for future, cases and for state as well as for federal, courts is completely untenable, because such a rule would be unrealistic and unnecessary. Obviously, the impact on the administration of justice of a *per se* holding would be enormous for several reasons. First, unlike the situation in *Jackson* v. *Denno,* 378 U. S.

368, new trials would [illegible] to be held rather than new hearings. Moreover, the number of trials to be held would almost certainly have to exceed the number of trials originally held. In the instant case, for example, all of the petitioner's co-defendants would be entitled to apply for new trials. In *People* v. *Baker, supra,* six trials may be held in place of the original one. This proliferation of new trials in the face of increasing criminal litigation is a strain on the state courts which they are not presently prepared to handle.

Retroactive application of the stringent interpretation of *Bruton* proposed by petitioner would have another, more disastrous effect: overturning of the convictions of countless felons, whose trials in state or federal courts were conducted in accordance with principles approved by this Court. There is a curious suggestion in *Roberts* v. *Russell,* that reliance on this Court's unequivocal ruling in *Delli Paoli* was unjustified because the decision had been criticized since it was announced. But surely the *Delli Paoli* decision was entered in the knowledge that it would be relied upon not in the expectation that it would be repudiated. The fact is that in thousands of cases, state and federal judges did reasonably rely upon *Delli Paoli,* and upon similar rulings in many subsequent cases decided by this Court, including *Johnson* v. *New Jersey* (1966) and *Gilbert* v. *California* (1967); indeed, it is to be presumed that the criticism of the *Bruton* decision, since it was announced, is no cause for lower courts, defense counsel or prosecutors to eschew it.

It is little comfort that the direct result of retroactivity of a broad interpretation of *Bruton* would be merely new trials, not immediate release of dangerous criminals. For new trials of old cases would be impossible in many instances, due to the absence of witnesses and the dulling of recollections. And if this Court rules in *Jenkins* v. *Delaware,* No. 748, that *Miranda* v. *Arizona,* applies upon re-

trial, the result urged by petitioner will indeed mean release for many convicted felons, retrials being impossible without their own confessions.

Thus, a broad interpretation of *Bruton*, retroactively applied, could mean the release of such dangerous convicts as Henry Dusablon and Emanuel Samperi, who recently were given a post-conviction hearing in the Supreme Court, New York County, to determine, *inter alia*, the retroactive effect of *Bruton* upon their convictions for first degree murder, entered in 1963. N.Y.L.J. Feb. 21, 1969, p. 17, col. 4. Also see *People* v. *Dusablon*, 16 N. Y. 2d 9 (1965). The evidence at trial showed that Dusablon, accompanied by Samperi in a robbery at a liquor store, shot the owner and a clerk through the head as they knelt on the floor, because, as he later explained to the police, "dead men tell no tales."

At the second stage of the trial, devoted to punishment, it was shown that these victims were among six whom the pair executed during a spree of robberies in New York City and Massachusetts, killing the witnesses to avoid identification. At the trial on the issue of guilt or innocence each defendant's full confession to the liquor store killing, implicating the other, was introduced. The convictions were confirmed by the lower court, on the ground that less prejudice attached than was found in *Bruton*. A *per se* rule would require reversal of the convictions, and even a standard of harmless error beyond a reasonable doubt would jeopardize them. If applied on the retrials, the defendants would go free. But surely a more sensible test is that new trials should not be required if there was no substantial risk that the defendant was prejudiced by the co-defendant's confession.

The standard here proposed would adequately expose past cases in which the integrity of the fact-finding process was significantly impeached. In this respect, the arbitrary *per se* test or a test of harmlessness beyond a reasonable doubt is unnecessary. In *Stovall*, where the Court was

also concerned with effective confrontation—of innocent eyewitnesses, not accomplices—those tests were rejected as to past cases; only for future cases was a stringent standard of harmlessness adopted for testing the effect of the absence of counsel at a line-up.

In other situations where the integrity of the fact-finding process was not irrelevant to the purpose of the new ruling, this Court has denied retroactivity completely, including rulings relating to the right to trial by jury, the right to the *Miranda* warnings before custodial interrogation, and comment by the court or prosecutor upon the defendant's silence at trial; plainly, a new constitutional ruling need not be applied retroactively, such that only harmless error beyond a reasonable doubt will save a conviction, merely because the ruling was designed to enhance the integrity of the fact-finding process. Decisions to that effect have weighed the probability that the verdict of guilt was unreliable against the disruption to the administration of justice stemming from retroactivity, and reliance on prior rulings. Reliance upon *Delli Paoli*, *Gilbert*, *Johnson* and other cases was justified, we submit. Disruption from retroactive application of a broad interpretation of *Bruton* is clear. On the other hand, impeachment of the verdict of guilt is remote where there is no substantial risk that the jury was prejudiced by the co-defendant's confession. The accuracy of the verdict of guilt is threatened only where two occurrences combine: the jury was persuaded in its verdict by the co-defendant's confession and that confession was false.

Moreover, to the extent that a *per se* rule would virtually abolish the joint trial in the future, it is undesirable. While the Court in *Bruton* pointed to very real patterns of abuse resulting from an exaggeration of *Delli Paoli's* expressed faith in the efficacy of instructions by the trial court, it did not announce a strict rule against joint trials, and should not now. In *United States* v. *Bozza*, 365 F. 2d 206, 217 (2d Cir. 1966), Judge Friendly anticipated

Bruton in rejecting the idea that the Judge's instructions will necessarily cure prejudice in these cases but he similarly rejected the idea that they are never sufficient.

The rule announced in that case is that the factors supporting a joint trial must be balanced against those militating for severance on a case by case basis. Judge Weinfeld's excellent discussion in *United States* v. *Kahaner*, 203 F. Supp. 78 (S.D.N.Y. 1962), is to the same effect.

The prosecution should not be required in every case to elect between a joint trial and admission of a confession against the maker. A voluntary confession often is the best evidence of guilt and is absolutely necessary if certain crimes are to be prosecuted at all. See *Miranda* v. *Arizona*, 384 U. S. 436.

The basis of the joint trial in the instant case is that four people robbed a liquor store and in the process killed an employee. Those are the facts which must be presented to the jury whether the defendants are tried separately or together. Most of the evidence introduced in this case or in many of the thousands of similar cases will be applicable to all the defendants. Also see *United States* v. *Smith*, 209 F. Supp. 907, 914 (E. D. Ill. 1962). To the extent that a trial is a search for truth, it is preferable to try the case in one piece. The joinder in this case, as in most other joint trials, is not the deliberate scheme of the prosecutor but of the perpetrators. This view of a joint trial was one of the important underlying bases for the development of the theory in the Second Circuit which resulted in that court's and this Court's decisions in *Delli Paoli*. In curing the deficiencies in an absolute treatment of *Delli Paoli*, it would be a mistake to go to the other extreme and forget the wisdom on which it is based.

When the proof presented against one defendant who is tried alone must demonstrate the guilt of four, an element of confusion must enter the jury room. Of course, the Court will instruct the jury to disregard the absence

of the other defendants but in order to believe that they could reach a just result, we again are thrown back on the assumption that juries follow the court's instructions. Just as joint trials have been abused by prosecutors deliberately laying before them evidence admissible against only one defendant (*Bruton* v. *United States, supra,* at 136), defense lawyers have exploited the fact of severance to insinuate doubt in the juror's mind that if four people committed a crime and only one was present, how could they be sure that the crime had been solved.

Thus, a joint trial for a joint crime is ordinarily preferable. This has consistently been the practice. For instance, under Rule 14 of the Federal Rules of Criminal Procedure relating to prejudicial joinder, courts have held that there is a strong presumption in favor of joint trials. *Brown* v. *United States,* 375 F. 2d 310, 315 (D. C. Cir. 1967), *cert. denied* 388 U. S. 915; *Golliher* v. *United States,* 362 F. 2d 594, 603 (8th Cir. 1966); *Sagansky* v. *United States,* 358 F. 2d 195, 199-200 (1st Cir. 1966); *Williamson* v. *United States,* 310 F. 2d 192, 197 (9th Cir. 1962); *Daley* v. *United States,* 231 F. 2d 123 (1st Cir. 1956), *cert. denied* 351 U. S. 964; *U. S.* v. *Crisona,* 271 F. Supp. 150 (S.D.N.Y. 1967); *United States* v. *Steel,* 38 F.R.D. 421 (S.D.N.Y. 1965); *United States* v. *Boyance,* 30 F.R.D. 146 (E. D. Pa. 1962); *United States* v. *Smith, supra; United States* v. *Kahaner, supra.*

Neither the burden on the administration of justice nor trial efficiency justifies infringement of constitutional rights, but the due process standard of substantial risk of prejudice provides ample protection for defendants while alleviating what must, in any event be a great impact on the courts. This standard is both appropriate to federal review of state decisions and provides flexibility for taking into account the numerous factors and factual variations which must inevitably arise in this area.

The litigation since *Bruton* and *Roberts* indicates that there are as many variations as there are cases and that

the factors favoring a joint trial will be very strong in one case and insignificant in another. The factors tending to create prejudice to a defendant, particularly if his co-defendant has confessed, ought to be persuasive in many instances. The same factors will be considered by a court deciding the motion to sever a future trial and one reviewing a claim of prejudicial joinder as to a past trial. However, with regard to the future trial, the court must use special care to insure that that trial will not be infected, since many of the factors are unknown. *United States* v. *Haupt, supra; United States* v. *Kahaner, supra.*

As we have just discussed, one important factor for a court to consider in deciding whether a joint trial is proper is the extent to which the charges are identical and intertwined and the extent to which the evidence against all the defendants is the same. The court must also consider whether a jury would be confused by an artificial severing of the cases.

This Court in *Bruton* indicated that the only considerations which motivated the prosecution to seek a joint trial were convenience, economy and efficieny. As Judge Learned Hand has noted, there also is the element of the search for truth (*Nash* v. *United States, supra*). Nonetheless, efficiency, economy and convenience are but materialistic names for very human needs. The convenience of victims, other innocent witnesses and citizens who serve on juries, those forgotten people of the criminal system, is underrated in the abstract. However, when trial judges are faced with concrete situations, such factors obviously have been found compelling.

A witness who has testified in a Grand Jury proceeding, who has been interviewed repeatedly by law enforcement officers, who has made numerous fruitless appearances in court now will be asked to appear more times and possibly have his personal life painfully torn apart in a way only cross-examination can do. This witness has very likely

been a victim of a painful crime and a constant testimonial reliving of his horror seems an unnecessary torture for him if there is no realistic risk of injury to the co-defendants by reason of the joint trial.

A case which graphically illustrates this point is that decided by the New York Court of Appeals in *People* v. *Baker*, 23 N. Y. 2d 307 (1968). Mr. Sugar, a Hungarian refugee, owned a small retail clothing shop in New York City. One afternoon, six young men gratuitously stabbed his wife to death and, while he futilely sought to protect her, stabbed him seven times. He was saved from death by an emergency operation and lived to tell the tale to law enforcement officials, to a Grand Jury, and to judges at several pre-trial hearings. He also testified at trial against six defendants and was cross-examined extensively by six counsel. The six men were convicted. Their convictions were reversed in light of this Court's decision in *Bruton*.

Mr. Sugar now faces the likelihood of testifying six more times about those tragic events, which were as devastating in Mr. Sugar's life as they were in that of the six co-defendants. This does not mean that the Court of Appeals was wrong in balancing the chance of prejudice to the six co-defendants against the "convenience", of Mr. Sugar, but only that in balancing between convenience and constitutional rights, the former factor can be as genuine an issue as the latter.

In a particular case even economy and efficiency are factors which may have a life force. We are presently in an era where crime is increasing, the percentage of trials is increasing, and the complexity of criminal litigation is increasing. Furthermore, an expansion in a number of trials means a delay in others which in itself might violate a substantial right. Eventually, the system will expand to meet this flood of increased litigation but it takes time to digest the confession hearings (*Jackson* v. *Denno*,

supra), taint hearings (*Gilbert* v. *California, supra; United States* v. *Wade, supra*), insanity hearings (*Pate* v. *Robinson,* 383 U. S. 375), suppression of tangible evidence hearings (*Mapp* v. *Ohio, supra*), an increased number of jury trials (*Duncan* v. *Louisiana, supra; Bloom* v. *Illinois, supra*), and the geometric increase in collateral attack on past convictions. This difficulty has been recognized repeatedly by this Court in holding certain new rulings prospective only. See cases cited at page 8, *supra.*

Even cost can be a human consideration in an era when state and local administration is actively competing directly with health, education and welfare for the tax dollar. A general policy favoring multiple trials for joint crimes will be costly in and of itself; but there are even instances where severance will result in so many* trials of such length (e.g., *Olivas* v. *Eyman,* 449 P. 2d 942 [Sup. Ct. Ariz., *in banc,* 1969]), that the expense is a consideration if the chance of prejudice is slight.

In order to determine whether there was serious risk of substantial prejudice, to a non-confessing co-defendant the court must consider the entire context of the trial including the quality of the limiting instructions, the nature of the confession, its relationship to the co-defendant, the kind of evidence introduced against the defendant, the weight of the other evidence, and the specific protection afforded the defendant's right of confrontation.

The quality of the limiting instructions is crucial in weighing the risk of prejudice. In certain cases precise and lucid instructions would be sufficient to insure against the possibility of prejudice. *Haggard* v. *United States,* 369 F. 2d 968 (8th Cir. 1966), *cert. denied* 386 U. S. 1023; *United States* v. *Smith, supra; People* v. *Camarillo,* 266 Cal.

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* For example a list of Federal multi-defendant trials in the Second Circuit is contained in Judge Moore's dissent in *United States* v. *Bozza, supra* at 229, n. 4.

App. 2d 266, 72 Cal. Rptr. 296 (1968); *People* v. *Willis*, 30 A. D. 2d 817 (3rd Dept. 1968). Also see Judge Medina's concurring opinion in *United States* v. *Delli Paoli, supra* at 322; *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580 (S.D.N.Y. 1967).

Evidence that the instructions had, in fact, been effective would also be relevant in determining whether the jury was prejudiced against the non-confessing defendant. In *Fiswick* v. *United States*, 329 U. S. 211, the jury did express confusion about the extent to which one co-conspirator was bound by the act of another. In that case this Court held that it was improper to bind the co-conspirators by post-conspiracy admissions. However, had the trial court clearly and properly instructed the jury that the admissions of one defendant were inadmissible against the other, the willingness of the jury to follow such instructions would have been demonstrated by the question. Furthermore, if a jury were to acquit the defendant on one count which would have been supported by statements in the confession or if there was an acquittal of another co-defendant also implicated in the confession, the jury would have demonstrated its ability to discriminate in the given case. Compare *United States* v. *Bozza, supra*, where the fact that the only exhibit taken into the jury room was the confession of one of the defendants strongly supported an inference of prejudice to the co-defendants.

The nature of the co-defendant's admissions also is of critical importance in determining whether or not a jury might have been prejudiced by them. In *Bruton*, this Court emphasized that the declarant's implication of his co-defendant was unreliable because of the natural motivation of the co-defendant to exculpate himself thereby. *Id.* at 136. Also see *Barton* v. *United States*, 263 F. 2d 894 (5th Cir. 1959); *Dauer* v. *United States*, 189 F. 2d 343 (10th Cir. 1951). However, in specific cases the facts might prove the opposite. If the co-defendant assumed the larger share of guilt, his statement would not be inevitably suspect.

The amount of detail, the actions of the other party, and the dramatic tenor of the confession are also relevant factors. The lack of consequence of the report of the statements was held determinative in *Wapnick* v. *United States*, —— F. 2d —— (2d Cir. decided February 11, 1969), Sl. Sh. Op. No. 292 Sept. Term 1968, p. 1227; *United States* v. *Hoffa*, 402 F. 2d 380 (7th Cir. 1968). Evidence of oral confessions has tended to be less prejudicial (*Wapnick* v. *United States, supra*) than written (*United States* v. *Bozza, supra; United States* v. *Delli Paoli, supra*); but also less subject to redaction (*United States ex rel. Hill* v. *Deegan, supra*).

If the role of the co-defendant is severable and redacted from the version of the confession introduced at trial, that should be sufficient to overcome any chance of prejudice. *Bruton, supra* at 134; *Oliver* v. *United States*, 335 F. 2d 724 (D. C. Cir. 1964); *People* v. *Vitagliano*, 15 N. Y. 2d 360 (1965); *People* v. *Aranda*, 47 Cal. Rptr. 353 (1965).

Even if it is necessary to refer to another person in the narrative of the crime contained in the confession, redaction can be effective if any suggestion is removed as to who that other person is, e.g. *People* v. *Vitagliano, supra*. In *United States ex rel. LaBelle* v. *Mancusi*, 404 F. 2d 690 (2d Cir. 1968), it was held that the confession was not sufficiently redacted to protect the identity of the non-confessing brother. A different situation is presented in the case where there is overwhelming independent evidence of the guilt of the non-confessing defendant; but where there is no textual clue as to who the partner in crime might be. In such a case, a jury disobeying the judge's limiting instructions might know who the unidentified person was, but the chance that they would look to, or rely on, the co-defendant's statements is slight and the risk of prejudice *de minimis*. Where most of the evidence is introduced against both defendants, the reasons for a joint trial overcome the risk of prejudice arising out of the introduction of the co-defendant's confession and redaction is effective.

In general, the context, atmosphere of the trial, and the strength and independence of the evidence against the non-confessing defendant are crucial in determining whether or not the joint trial has created a serious risk of substantial prejudice to the non-confessing defendants, e.g. *Bruton* v. *United States, supra; United States* v. *Jones,* 402 F. 2d 851 (2d Cir. 1968), *cert. denied* March 24, 1969 (O. T. 1968, No. 1314 Misc.), 37 L. W. 3356; *Nelson* v. *United States,* 397 F. 2d 814 (9th Cir. 1968), *cert. denied* March 24, 1969 (O. T. 1968, No. 1095 Misc.), 37 L. W. 3356; *Golliher* v. *United States, supra; United States ex rel. Floyd* v. *Wilkins,* 367 F. 2d 900 (2d Cir. 1966); *Williamson* v. *United States, supra.* In a case where both or all the co-defendants made significant admissions, the chance of prejudice is substantially eliminated, since a person's own statement is far more dramatically damaging than that of his co-defendant who has the inherent motive for lying. Thus, in a case involving cross-implicating confessions, the United States Court of Appeals for the Second Circuit held that there was not the "'devastating' risk involved in Bruton". *United States ex rel. Catanzaro* v. *Mancusi,* 404 F. 2d 296 (2d Cir. 1968), *cf. United States ex rel. Johnson* v. *Yeager,* 399 F. 2d 508 (3rd Cir. 1968); *People* v. *Pohl,* 23 N. Y. 2d 290 (1968); *People* v. *Camarrillo, supra.*

Similarly, if the other evidence of guilt is strong, there is little risk that the jury will disobey the judge and turn to the confession in order to determine the non-confessant's guilt and even if they do, there is little risk that he would be prejudiced.

The manner in which the confession is introduced is significant in determining the risk of prejudice and an attempt by the prosecution to implicate the non-confessing defendant by means of the confession of his co-defendant is totally impermissible. A case in which that fact is involved must, under *Bruton,* be viewed with great skepticism. One of the factors that seems to influence this Court in *Bruton* was the deliberation with which Evans'

confession was spread before the jury. *Id.* at 136. Also see *People* v. *Aranda, supra; People* v. *Baker, supra; People* v. *Weis, supra.* By contrast, where care is used in the introduction of the confession so as not to implicate the co-defendant, that also is of significance in determining the risk of prejudice.

If the confession is mere surplusage as evidence against the declarant, but damaging to the co-defendant, several Courts have held that the proper procedure is to suppress the confession. *United States* v. *Gottfried,* 165 F. 2d 360 (2d Cir. 1948), *cert. denied* 333 U. S. 860; *United States* v. *Kahaner, supra.* Also see *Dauer* v. *United States, supra.*

Finally, we must remember that it is the right of confrontation that *Bruton* vindicates. In a case where the co-defendant took the stand, there is an opportunity to confront and cross-examine the declarant and the Sixth Amendment right is protected. *Santoro* v. *United States,* 402 F. 2d 920 (9th Cir. 1968); *People* v. *Willis, supra; People* v. *Burwell,* 30 A. D. 2d 842 (2d Dept. 1968). Compare *United States* v. *Bujece,* 405 F. 2d 888 (2d Cir., 1969).

It must be remembered that a co-defendant's credibility ordinarily is challenged very severely at the trial, unlike that of the ordinary hearsay declarant. The very party which introduces his confession is charging him with a crime and is out to blacken his character. It is also possible that the confessor challenges the credibility of his own confession effectively without taking the stand. Certainly, the jury which must determine the confessor's guilt is not without the ability to find him an incredible "witness" and his inherent motive to lie which this Court noted in *Bruton* at 136 may well be dramatically brought home in a given case. Argument of counsel combined with the facts regarding the co-defendant's character and confession may be the equivalent of the right of confrontation under certain circumstances.

One final fact must be mentioned in judging the risk of prejudice in a given case and that is the benefit which directly accrues to the non-confessing co-defendant from a joint trial. In every case he benefits from his co-defendant's Fifth Amendment right not to testify. Thus in this case, had Harrington been tried separately, he might well have had three very powerful witnesses against him, his three co-defendants who had been previously tried and convicted. While his Sixth Amendment right to confrontation might be abridged, he is concomitantly shielded from very damaging evidence and we can understand Judge Hand's cryptic comment that a joint trial where confessions are introduced on balance "probably furthers rather than impedes the search for truth". *Nash* v. *United States*, *supra* at 1007.

In any event, the fact that his co-defendant might directly testify against him in a separate trial is a tactical reason for a defendant to refrain from moving to sever his trial from that of his co-defendant. The failure to make a timely motion should ordinarily be decisive in upholding the joint trial. See *Delli Paoli* v. *United States*, *supra*; *United States ex rel. Hill* v. *Deegan*, *supra*. But see *Bruton* v. *United States*, *supra*. Also see *United States* v. *Hoffa*, *supra*; *Calloway* v. *United States*, 399 F. 2d 1006 (D. C. Cir. 1968); *Williamson* v. *United States*, *supra* at 197.

Finally, it must be recognized that the possible implications of *Bruton* with respect to any evidentiary questions and the reliance which ever can be placed on the jury to follow instructions and to apply the law to the facts extend far beyond the broadest holding of that case itself. However, should the state courts and the lower federal courts wish to re-examine contiguous areas of criminal procedure, for example, the introduction of hearsay, the joinder of counts for trial, the use of conspiracy charges and a myriad of evidentiary matters, they are likely to hesitate in the face of a holding that *Bruton* announced a

per se retroactive rule. Any new holding relying on *Bruton* would be likely to require the same application although these questions, like the one presented here, turn on the facts of the individual cases. Thus, a *per se* rule would, in the long run, stultify the development of the law by making the front-line judges reluctant to undertake such drastic extensions of new rules and to apply them to every past and future prosecution.

CONCLUSION

For all the foregoing reasons we respectfully submit that the decision of the California Court of Appeal should be affirmed and that this Court should hold that a defendant tried jointly with a co-defendant who confessed must show that there was a serious risk that the introduction of that confession against his co-defendant substantially prejudiced his right to a fair trial.

Dated: New York, New York, April 1, 1969.

Respectfully submitted,

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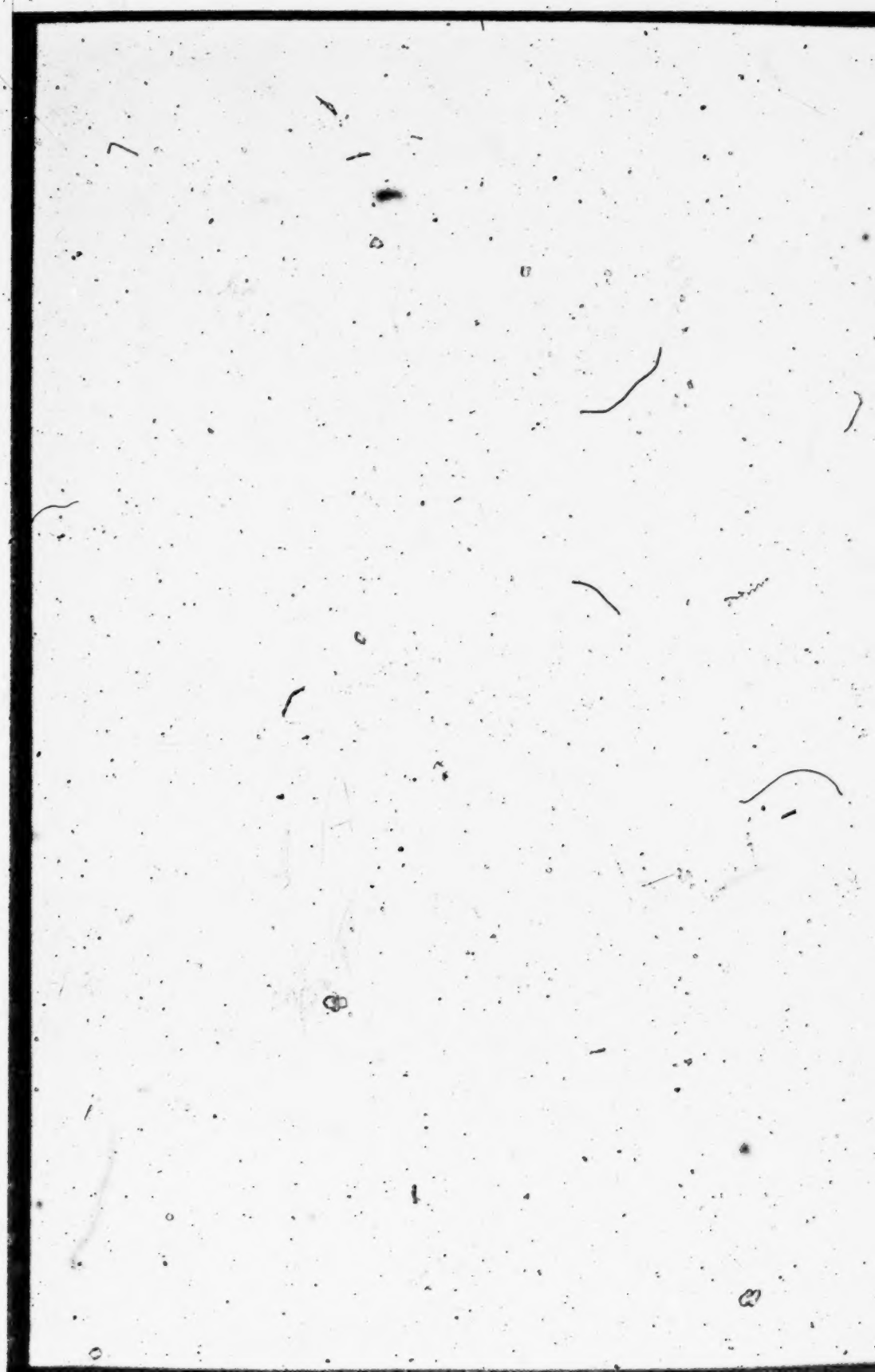

SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 750

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

CALIFORNIA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT — DIVISION 2

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 750

GLENN MARTIN HARRINGTON,

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THE STATE OF CALIFORNIA,

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION 2

PETITIONER'S REPLY BRIEF

To the Honorable Earl E. Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

I.

Comes now the petitioner, Glenn Martin Harrington, by his Attorney Roger S. Hanson, Esquire, of Woodland Hills, California and replies to the Brief of the respondent State of California now on file with this Honorable Court:

ARGUMENT

I.

The Extrajudicial Statements of the Three Codefendants Bosby, Cooper, and Rhone Do Fall Within the Ban of Bruton v. United States, 391 U.S. 123 (1968), and Roberts v. Russell, 392 U.S. 293 (1968).

Respondent State of California argues that only codefendant George Rhone actually mentioned petitioner by name, while codefendants Cooper and Bosby only described him as "the white man," "the Caucasian," "the patty," and other similar general terms, and since Rhone took the stand and was cross-examined, no *Bruton-Roberts* error was committed in the instant trial.

Such reasoning is not persuasive, for it would be indulging in the height of naivete to promulgate a rule that requires actual mention by name of the petitioner to cause error; when three Negroes and one Caucasian are sitting at the defense table within clear purview of the twelve man lay-jury, and all three of the codefendants describe the crime implicating themselves and another man who is Caucasian with one of them identifying petitioner by name, it is manifestly clear that the testimony of the two codefendants was material and contributed to petitioner's conviction.

The State of California is reminded that even if a harmless error rule should eventually be applied, it shall certainly be the *Federal Rule* and the State of California must declare beyond a reasonable doubt that the error complained of did not *contribute* to the conviction.

The mandates of *Bruton* and *Roberts* are clear. This Honorable Court has studied and restudied the problem. The Honorable Justice Hugo L. Black in *Brookhart* v. *Janis*, 384 U.S. 1 has *already decreed* that "if there is a denial of cross-examination without waiver, it is a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

Roberts v. *Russell*, 392 U.S. 293 has already made the rule totally retroactive and applicable to the states. See also *Barber* v. *Page*, 390 U.S. 719, and *Berger* v. *California*, January 13, 1969, —— U.S. ——, No. 218 Misc. Clearly the statements of the codefendants Bosby and Cooper fall within the ban of *Bruton* v. *United States* and *Roberts* v. *Russell*, *supra*.

To hold otherwise would be to walk a tight-wire where every Court in the nation would be forced to indulge in the soul-searching and often indistinguishable idiosyncrasies of the factual situation of each case; litigation would be *promoted* at the appellate level rather than curtailed.

As the Honorable Justice Potter Stewart has so astutely discerned in his separate but concurring opinion in *Chapman* v. *California* (1967), 386 U.S. 18, 17 L.Ed.2d 705, 722, 87 S.Ct. 824, concerning the applicability of a harmless error to the *Griffin* violation (*Griffin* v. *California*, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229):

> "To be sure, constitutional rights are not fungible goods. The differing values which they represent and protect may make a harmless-error rule appropriate for one type of constitutional error and not for another. I would not foreclose the possibility that a harmless-error rule might appropriately be applied to

some constitutional violations. Indeed, one source of my disagreement with the Court's opinion is its implicit assumption that the same harmless-error rule should apply indiscriminately to all constitutional violations.

But I see no reason to break with settled precedent in this case, and promulgate a novel rule of harmless error applicable to clear violations of Griffin v. California, 380 US 609, 14 L.ed.2d 106, 85 S.Ct. 1229. The adoption of any harmless-error rule, whether the one proposed by the Court, or by the dissent, or some other rule, commits this Court to a case-by-case examination to determine the extent to which we think unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial. This burdensome obligation is one that we here are hardly qualified to discharge.

[9] A rule of automatic reversal would seem best calculated to prevent clear violations of Griffin v. California. This case is one in which the trial occurred before the Griffin decision but which was not final on appeal until afterwards, so the doctrine of prospectivity announced in Tehan v. Shott, 382 U.S. 406, 15 L.ed.2d 453, 86 S.Ct. 459, does not reach it. But the number of such cases is strictly limited. Prosecutors are unlikely to indulge in clear violations of Griffin in the future, and if they do I see no reason why the sanction of reversal should not be the result.

For these reasons I believe it inappropriate to inquire whether the violation of Griffin v. California that occurred in this case was harmless by any standard, and accordingly I concur in the reversal of the judgment."

It is manifestly lucid that the three cross-fertilizing confessions of codefendants *assured* a conviction of this petitioner, and were highly damning, persuasive, and counteracting when the two victims of the robbery admitted under oath that *both* had originally described the robbery as being perpetrated by *four Negroes* (Single Appendix, pages 88, 121). Petitioner Harrington is a Caucasian.

Petitioner has discussed the factual situation, as has the State of California, both in a competent manner; this Honorable Court has given extensive study to the problem, and the mandates are today well established.

Petitioner well qualifies, indeed is more qualified than even the *single* codefendant cases of *Bruton* v. *United States* and *Roberts* v. *Russell,* for automatic reversal of this conviction obtained without opportunity to totally cross-examine; a constitutional error of the first magnitude was committed and no showing of want of prejudice will cure it; 384 U.S. 1. We have the Honorable Justice Hugo Black writing for eight members of this Honorable Court well defining that already in *Brookhart* v. *Janis,* 384 U.S. 1. Further petitioner saith not.

II.

Automatic Reversal of Petitioner's Conviction Is Required Without Recourse to Any Harmless Error Rule; the Admission of the Extrajudicial Statements Were Clearly Harmful to Petitioner, Glenn M. Harrington.

It is to be observed that *Chapman* v. *California* (1967), 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 really applied a harmless error rule to *comments* about the evoking of another constitutional right; certainly no one would advocate as harmless error the situation where a prosecutor forced a defendant to take the witness stand in his own trial against his wishes, or prevented his taking the stand if he desired. If *that* had occurred, it would clearly be a constitutional error of the first order of magnitude, and no showing of want of prejudice would cure *that* error. Beneficently, however, for the prosecutors of this country, this Honorable Court allowed the application of a federal harmless error rule to *comments* by prosecutors concerning the failure of a defendant to voluntarily assume the stand in his own defense; *Chapman* v. *California, supra.*

Clearly the error under consideration in *Griffin* v. *California,* 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229, and *Chapman* v. *California* (1967), 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 was only the *comments* about the exercise of an otherwise constitutional right, and therefore obviously this Honorable Court felt that the error of *comment* fell short of the error of actually inducing the defendant to take the stand, or the preventing of the same.

As the Honorable Justice Potter Stewart has well defined and decreed, in *Chapman* v. *California,* 386 U.S. 18,

17 L.Ed.2d 705, 720, certain errors are to be held automatically reversible.

Among them are:

1. Involuntary confessions; see *Lynumn* v. *Illinois,* 372 U.S. 528, 537, 9 L.Ed.2d 922, 928, 83 S.Ct. 917 (the argument the error in admitting such confession "was a harmless one . . . is an impermissible doctrine."). See also *Malinski* v. *New York,* 324 U.S. 401, 404; *Payne* v. *Arkansas,* 356 U.S. 560, 568; *Spano* v. *New York,* 360 U.S. 315, 324; *Haynes* v. *Washington,* 373 U.S. 503, 518-519; *Jackson* v. *Denno,* 378 U.S. 368, 376-377.

2. Denial of counsel at trial ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States,* 315 U.S. 60, 76, 86 L.ed. 680, 702, 62 S.Ct. 457). See also *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L.ed.2d 799, 83 S.Ct. 792. See also *Hamilton* v. *Alabama,* 368 U.S. 52, 55, 7 L.ed.2d 114, 117, 82 S.Ct. 157. "We do not stop to determine whether prejudice resulted." In addition, see *White* v. *Maryland,* 373 U.S. 59, 60, 10 L.ed.2d 193, 194, 83 S.Ct. 1050.

3. Trial Judge's remuneration based on scheme giving him financial interest in the result, even if no particular prejudice is shown and even if the defendant was clearly guilty. See *Tumey* v. *Ohio,* 273 U.S. 510, 535, 71 L.ed. 749, 759, 47 S.Ct. 437.

4. Adverse publicity in the community where trial is held is per se grounds for reversal; no showing need be made that the jurors were in fact prejudiced

against the defendant. See *Dr. Samuel Sheppard* v. *Maxwell*, 384 U.S. 333, 351-352, 16 L.ed.2d 600, 613, 614, 86 S.Ct. 1507. (Aided, it might parenthetically be added, by David Janssen as Dr. Richard Kimball in the many-week T.V. Program "The Fugitive"); see also the problems of Texas anhydrous ammonia tycoon Billy Sol Estes, 381 U.S. 532, 542-544, 562-564, 593-594, 14 L.ed.2d 543, 549-551, 561, 562, 586, 587, 85 S.Ct. 1625. See also *Rideau* v. *Louisiana*, 373 U.S. 723, 727, 10 L.ed.2d 663, 665, 83 S.Ct. 1417

5. Instruction of juries on unconstitutional presumptions requires overturning the conviction even though there was ample evidence apart from the presumption to sustain the verdict. See *Bollenbach* v. *United States*, 326 U.S. 607, 614-615, 90 L.ed. 350, 355, 66 S.Ct. 402.

6. Obtaining a conviction on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained. See *Stromberg* v. *California*, 283 U.S. 359, 367-368; *Williams* v. *North Carolina*, 317 U.S. 287, 292.

7. Purposeful discrimination in the selection of grand and petit juries is automatically reversible without a necessity to show prejudice to the defendant convicted under such a disability. See *Whitus* v. *Georgia*, 385 U.S. ——, 17 L.ed.2d 559, 87 S.Ct. 643.

8. To the above may be added the significant cases on the knowing use of perjured testimony to obtain a conviction; these have been reversed without recourse to "harmless error rules." See *Napue* v. *Illinois*, 360

U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173; *Miller* v. *Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690; *Alcorta* v. *Texas*, 355 U.S. 28, 2 L.Ed.2d 9, 78 S.Ct. 103; *Malloy* v. *Hogan*, 378 U.S. 1, 12 L.ed.2d 653, 84 S.Ct. 1489; *Giles* v. *State of Maryland*, 386 U.S. 66, 17 L.Ed.2d 737.

The reason, of course, is that these errors were "constitutional errors of the first order of magnitude and no showing of want of prejudice would cure them," per Justice Hugo Black, *Brookhart* v. *Janis*, 384 U.S. 1.

Likewise is the instant error in the case at bar. The denial of a right to confront *all* witnesses testifying against the defendant is a denial of a constitutional right of the first order of magnitude, whenever it happens, wherever it happens, and no matter what other evidence could support the conviction, 384 U.S. 1, Justice Black expressing the views of eight members of this Court.

Petitioner urges that without explicitly adjudging in either *Bruton* v. *United States*, 391 U.S. 123, or *Roberts* v. *Russell*, 392 U.S. 293, this Honorable Court has already decreed that no harmless error rule shall be applied to the instant error, for it is of the class of errors of the first order of magnitude. If the error in *Jackson* v. *Denno*, 378 U.S. 368, 376-377 is automatically reversible, so must this error.

This Honorable Court is reminded that the instant error is potentially much more dangerous than the *Jackson-Denno* error for the simple reason a confession which is ordered to be not considered against defendants not making it still physically remains in the case against the maker; as such it may and usually is taken into the jury room as an exhibit to be read and reread, ingested, digested, and discussed.

The implicating features as to the other codefendants are thus able to make recurring, machine-gun-like impressions on the minds of the jury, offset only by the already-held-inadequate instructions to the jury to disregard the confession as to all non-makers. Of course, in the *Jackson* v. *Denno* error, the confession was totally removed from the case.

It seems without fear of contradiction that if the error condemned in *Jackson* v. *Denno,* 378 U.S. 368, is not to be saved by a harmless error rule, so much more shall the instant error fail of rescue.

This Honorable Court has already considered numerous cases under the *Bruton-Roberts* error, and has remanded them for further consideration in light of the above decisions.

It is, therefore, beneficial to inquire into the facts of some of these cases to ascertain whether other evidence existed in addition to the confession of one codefendant which implicated the other.

Jack Lloyd McCarty and John Boyd v. *Kansas,* —— U.S. ——, 20 L.Ed.2d 1115, 88 S.Ct. ——, June 10, 1968, was remanded to the Kansas Supreme Court on behalf of petitioner Boyd. At 199 Kansas 116, the opinion of the Kansas Supreme Court sets out the evidence against John Boyd in addition to McCarty's implicating confession. McCarty and Boyd held up a Topeka, Kansas liquor store. Boyd was clearly identified by prosecution witness Taylor when leaving the scene of the crime in the get-away car, whose license was obtained. Taylor followed the car, giving police a description. Shortly thereafter, both men were apprehended together, the police finding them with the get-away auto, having in their possession several 25¢ coins

marked with red X's, which were used by a customer to purchase a bottle of liquor immediately before the crime. In rejecting any contention that the yet-to-be decided *Bruton-Roberts* error existed, the unanimous Kansas Supreme Court stated:

> "The evidence against Boyd, from sources other than McCarty's statement, was persuasive . . ." (199 Kans 116, 122).

Hence it appears that certainly other convincing evidence existed to convict Boyd—an eye witness, marked coins, an identified get-away car. This Honorable Court gave no heed to all that other evidence in remanding to the Supreme Court of Kansas; this Court noted the violation of *Bruton* and *Roberts* and summarily remanded.

In *Donald E. Hunt, Petitioner* v. *Connecticut,* —— U.S. ——, 20 L.Ed.2d 1110, 88 S.Ct. ——, remand was ordered to the Supreme Court of Connecticut on June 10, 1968, for further consideration in light of *Bruton-Roberts.*

At 154 Conn. 517, the Supreme Court of Connecticut treated the evidence against Hunt. Connecticut police came upon a totally naked woman running from the woods, claiming she had been raped by Hunt and codefendant Doten. Immediately the also totally naked Hunt was arrested. Photographs taken showed severe scratch marks on Doten's face and on Hunt's nose, and bruises and abrasions on the face, arm, knee, and back of the complainant. The complainant identified both men as the rapists. Doten implicated Hunt with a statement.

Whatever the damning nature of the statement, other evidence existed to convict Hunt both directly and circumstantially—the direct testimony of the complainant, the

scratches and abrasions on the parties, and the circumstantial fact of finding Hunt and the prosecutrix totally naked in the woods certainly presented a solid case against Hunt, for being naked with the complainant, "it is presumed he saith not a pater noster there" (*Kerr* v. *Kerr,* 118 N.Y. Supp. 801 (1909), citing Burton's Anat. of Mel., vol. 2, pt. 3, Sec. 3, Mem 1, Sub 2).

Yet, this Honorable Court did *not* let the additional evidence bother it in remanding to meet the reversing mandates of *Bruton* and *Russell,* 391 U.S. 123 and 392 U.S. 293, respectively.

In perhaps one of the more famous capital punishment-premeditated first degree murder-arson cases in all of California history, *People of the State of California* v. *Clyde Bates and Manuel Chavez,* 50 C.2d 778, Bates and Chavez were condemned to California's San Quentin Penitentiary gas chamber for their deliberate arson of the Mecca Bar in Los Angeles following an altercation there. The pair went to a gas station and purchased 5 gallons of gas in an open pail container, and returned to the bar, sloshing it all over the floors and bar and igniting it with a match. *Seven* people were burned to death. Codefendant Hernandez made statements to the police implicating Bates and Chavez in the crime. However, it is quite clear that other independent evidence was available to convict both Bates and Chavez; numerous eye witnesses, the service station attendant who sold the gas in an open, unmarked, non-red container in violation of local law itself, and the general irrefutable web of circumstantial evidence wrought by the close temporal proximity of all events presented an excellent prosecution case without the implicating confession of codefendant Hernandez. Yet at —— U.S. ——, ——

L.Ed.2d ——, —— S.Ct.——, ..., 1968, this Honorable Court remanded the *Bates-Chavez* case to the Ninth Circuit Court of Appeals for reconsideration in light of *Bruton* v. *United States,* 391 U.S. 123, and *Roberts* v. *Russell,* 392 U.S. 293; this originally capital punishment case, under initial jurisdiction of the Supreme Court of California under California Penal Code Section 1239 b, was relegated to life imprisonment sentences when California Governor Edmund G. Brown commuted the death sentences in late 1967 before leaving office.

Petitioner assumes, as does his counsel, that this Honorable Court remanded to local courts all of the above cases to allow the local courts to order the reversals, in keeping with the generally recognized traditions of minimal interference of federal courts in State Criminal Proceedings; petitioner and his counsel assume it was not done for any question or hesitation on the part of this Honorable Court whether or not the cases clearly demanded reversal in light of *Bruton* v. *United States* (1968), 391 U.S. 123, and *Roberts* v. *Russell* (1968), 392 U.S. 293.

Similarly, in *Phillip Santoro* v. *United States,* —— U.S. ——, —— L.Ed.2d ——, 88 S.Ct. 2054, 388 F.2d 113 (1967), this Honorable Court remanded in light of *Bruton-Roberts;* the appellant was found with stolen credit cards belonging to one Ralph Sieben, whose stolen Cadillac appellant was attempting to sell when apprehended by the F.B.I.

Ninth Circuit Court of Appeal Justice Stanley Barnes, in affirming appellant's conviction at 388 F.2d 113, 115, stated:

> "The evidence, other than the implication contained in these statements, was ample to sustain the jury's verdict."

Gary David Nelson v. *United States*, —— U.S. ——, —— L.Ed.2d ——, 88 S.Ct. 2062, 375 F.2d 739 (1967) was remanded for *Bruton-Roberts* errors. While the opinion below has a paucity of detail, Chief Judge Richard Chambers stated at 375 F.2d 739:

> "The evidence as to Nelson was largely circumstantial, but convincing."

Hence, it is apparent that again this Honorable Court remanded without hesitation when the *Bruton-Roberts* error occurred.

See also *August J. Serio* v. *United States*, —— U.S. ——, —— L.Ed.2d ——, 88 S.Ct. 2063, 377 F.2d 936.

In *United States* v. *Jeffrey Bujese*, 392 U.S. 297, —— L.Ed.2d ——, 88 S.Ct. 2064, 378 F.2d 719, Bujese's co-defendant Hutchins pleaded not guilty and *took the stand*. After denying on direct examination having committed the robbery, he confessed to the crime on cross-examination before the jury after the government had confronted him with his previously signed confession. The signed confession, introduced into evidence, implicated Bujese. At several points thereafter, the trial court instructed the jury that Hutchins' confession implicating Bujese was "not binding" on Bujese. In two instances, including the charge to the jury, which included the following, the judge told the jury that the confession was not to be used "as against" Bujese:

> "Under no circumstances is the signed confession of Hutchins to be considered as against Bujese.
>
> "You see, the reason it is admissible against Hutchins is because it is an admission against interest. Admis-

sions against interest are always allowable in law as against the party who makes it.

"As against Bujese, however, it would be pure rank hearsay, and I think we all know, even non-lawyers, that hearsay is not allowable against you. You must have competent evidence.

"The statement of Hutchins against Bujese is hearsay. It is not binding on him in any event."

It is important to here note the following portion of the opinion below, at 378 F.2d 719, 720:

"After Hutchin's confession in open court, appellant (Bujese) called him (Hutchins) as a witness for the defense, whereupon Hutchins testified that the statement in his signed confession implicating appellant was wrong, and that in fact, appellant had refused to participate in the robbery. *There was substantial evidence against appellant, however,* to support the jury's verdict."

This Honorable Court's attention is called to the fact that it remanded *United States* v. *Bujese*, 392 U.S. 297, 20 L.Ed.2d 1113, 88 S.Ct. 2064, 378 F.2d 719 to the United States Court of Appeals for the Second Circuit in light of *Bruton-Roberts* even when the following occurred at trial:

1. The codefendant Hutchins, who had made the implicating confession, *took the stand and was subjected to full examination, both cross and direct;*

2. The codefendant Hutchins was also later called to the stand as a defense witness for Bujese, and attempted

to counteract the confession, he was here again subjected to full cross-examination.

Thus it is evident that this Honorable Court does not distinguish between the situations whether the codefendant takes the stand or does not take the stand for cross-examination purposes, in evaluating a *Bruton-Roberts* error; this Honorable Court summarily remanded to allow the lower court to effect relief in the way of reversal in light of the directives of *Bruton* and *Roberts* v. *Russell*.

It is therefore evident that in the instant case now at bar, the fact that codefendant George Rhone did take the stand should be of no consequence; the *Bruton-Roberts* error occurred, and the case should be automatically reversible.

Petitioner Glenn Martin Harrington, via his counsel, encourages this Honorable Court to spell out with specificity in its opinion in the instant case that the fact that a codefendant does take the stand shall not save the case from reversal when it is afflicted with the *Bruton-Roberts* error.

It is to be noted that, as appellant and petitioner extensively has already pointed out in his opening brief, the State of Illinois does not tolerate the *Bruton-Roberts* error, and reverses summarily if it occurs. In a recent case, *People* v. *Scott*, 241 N.E.2d 579, 583, 100 Ill.App.2d 473, in reversing, the Court stated:

"We also suggest that the defendants be tried separately if the State again intends to use Walker's oral statement. As related by the police, Walker's statement detailed the principal role played by Scott in the burglary. It was neither made in Scott's presence nor

assented to by him and, despite warnings by the court that it should be considered only as to Walker (as was done in the instant case) *its use would be prejudicial error.* Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968). See too, People v. Barbaro, 395 Ill. 264, 69 N.E.2d 692 (1946) . . . *The fact that Walker took the stand and that Scott had an opportunity to cross-examine him did not mitigate the error . . .*"

It is therefore evident that the Illinois Appellate Court interprets the mandates of this Honorable Court in *Bruton* v. *United States,* 391 U.S. 123, and *Roberts* v. *Russell,* 392 U.S. 293 to mean *automatic reversal without recourse to harmless error rules,* and *it is immaterial whether the co-defendant takes the stand or not;* the judgment is summarily and automatically reversed.

See also *Donald Felix Schneble and Edward Frank Snell* v. *State of Florida,* 201 So.2d 881, Supreme Court of Florida, 1967, —— U.S. ——, —— L.Ed.2d ——, 88 S.Ct. 2067, remanded by this Honorable Court for violation of the *Bruton-Roberts* doctrine.

See also *State of Louisiana* v. *John T. Hopper and Joe A. Woodward,* Supreme Court of Louisiana, 251 Louisiana 77, 134-137, —— U.S. ——, —— L.Ed.2d ——, —— S.Ct. ——, remanded on *Bruton-Roberts,* where each defendant Hopper and Woodward gave cross-implicating confessions. That factual situation did not deter this Honorable Court from remanding.

In finality, this petitioner calls to the attention of this Honorable Court that of the cases cited by respondent State

of California in its brief under issue II, in support that *Bruton* should be subjected to the federal harmless error standards of *Chapman* v. *California*, 386 U.S. 18, some were decided *prior to* this Honorable Court's decisions in *Bruton* v. *United States*, 391 U.S. 123, and *Roberts* v. *Russell*, 392 U.S. 293.

See *People* v. *Flores*, 68 Cal.2d 563, 568, 68 Cal.Rptr. 161, 164, 440 P.2d 233, 236 (1968), decided May 9, 1968; *Bruton* was decided May 20, 1968. The *Flores* case however alluded to the *Bruton* decision, by way of modification of the original opinion, and contended that the following language of *Bruton* did not require automatic reversal:

> "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions . . ." (391 U.S. 123, 1035.)

The California Supreme Court opinion at 568 of 68 Cal.2d 563 fails to point out, however, that this Honorable Court went on in its opinion in *Bruton* to state (20 L.Ed.2d 476, 485):

> *"Nevertheless, as was recognized in Jackson* v. *Denno, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial . . . REVERSED."*

In *United States* v. *Lipowitz,* 401 F.2d 591, 593 (Third Circuit, 1968) the *Chapman* rule was applied because *all* of the testimony of the codefendant was stricken, and the Court *distinguished Bruton* v. *United States,* 391 U.S. 123 from their instant case at bar.

It is interesting to note that in *United States ex rel. Johnson* and *Cassidy* v. *Yeager,* 399 F.2d 508, 510-511, the Court of Appeals for the Third Circuit granted a Writ of Habeas Corpus for the *Bruton* error in the famous case denying retroactivity of the rule of *Miranda* v. *Arizona* by this Honorable Court, 384 U.S. 719; while alluding to the possibility of the use of the *Chapman* harmless error rule, the Court concluded on the basis of the facts of the case, the situation was much too critical to risk contemplation, and concluded that they could not say the error was harmless beyond a reasonable doubt (399 F.2d 508, 511).

Without the mandates of *Roberts* v. *Russell,* 392 U.S. 293, the United States Court of Appeals for the Seventh Circuit reversed without recourse to a harmless error rule in *U.S.A.* v. *Lyon,* 397 F.2d 505, 510 for violation of *Bruton* v. *United States,* 391 U.S. 123.

See also *U.S.A.* v. *Kelly,* 399 F.2d 692, Third Circuit 1968; *People* v. *Fox,* —— N.C. ——, 163 S.E.2d 492, 502 (1968); *Branch* v. *State,* 212 So.2d 29, 32-33 (Fla. 1968); *Gelis* v. *State,* 215 So.2d 86 (Fla. 1968); *People* v. *Burwell,* 30 A.D. 2d 842, 292 N.Y.S.2d 965 (1968).

Petitioner is quick to point out that the case relied on by the respondent State of California, *United States* v. *James R. Hoffa,* 402 F.2d 380, 387 (Seventh Circuit, 1968), for the theory that the jury *can* follow limiting instructions, is to be clearly distinguished from *Bruton;* in the *Hoffa* case, at 386 of 402 F.2d 380, the Court stated:

"These statements were not incriminating with respect to the indictments in this case or as to any co-defendant."

Hence, it is clear that if the statements were not incriminating, apparently no *Bruton* error occurred, and the issue *could* be handled by jury instructions.

Naturally, the *Hoffa* case cannot even be applied in the instant case, *Harrington* v. *California*.

Petitioner further does not agree with respondent State of California that "the language used in cases such as *Atwell* v. *United States*, 398 F.2d 507, 510-11 (Fifth Circuit 1968) indicates no automatic reversal"; it simply fails to discuss the harmless error aspects in reversing; it is just as logical to conclude that the Court has inferred that *Bruton* and *Roberts demands* reversal and there is no need to further discuss the error.

Petitioner here shall conclude his brief with the admonition to this Honorable Court that there was independent evidence apart from the confession and implicating statements of codefendant William James Evans which could have served to convict George William Bruton. In 375 F.2d 355, 357, 362, 363, the lower Court recounts the clear eyewitness identification of Bruton by postal employee Shirley Miller, plus the clear identification of codefendant Evans by both Miss Miller and store owner Paul J. Robinson. *Independent evidence did exist*, but this Honorable Court was quick to *reverse totally without recourse* to Harmless Error Rules, and without "remand for further consideration" because the error committed was "one of the first order of magnitude and no want of prejudice would save

it," per the Honorable Justice Hugo Lafayette Black, in *Brookhart* v. *Janis*, 384 U.S. 1.

The mandates are clear; as the hart panteth after the water brooks (Psalm 42:1), petitioner eagerly anticipates the mandate of this High Tribunal to settle once and for all this immensely troubling area of criminal procedure on a national level, totally retroactive, without recourse to "harmless error rules," and without further "remand for additional consideration not inconsistent with the instant opinion."

III.

The Cases of Bruton v. United States (1968), 391 U.S. 123, and Roberts v. Russell (1968), 392 U.S. 293, Have Been Properly Applied Totally Retroactively and Have Been Made Mandatory Upon the States Via the 14th Amendment, and There Is Absolutely No Need to Once Again Consider the Issue of Retroactivity.

The State of California urges this Honorable Court to consider again its decision to give total retroactive application to the mandates of *Bruton* v. *United States* (1968), 391 U.S. 123, and *Roberts* v. *Russell* (1968), 392 U.S. 293.

There is no need whatsoever to reconsider the well reasoned opinions of *Bruton* v. *United States* and *Roberts* v. *Russell, supra.*

Indeed, this Honorable Court has once again after *Bruton* and *Roberts* considered the retroactivity problem. In the major decision *Barber* v. *Page* (1968), 390 U.S. 719, —— L.Ed.2d ——, 88 S.Ct. 1318, this Honorable Court recognized the violation of the confrontation clause in the error of using preliminary hearing transcript testimony in the

actual trial without exercising due diligence to subpoena the witness, by merely reading that testimony to the jury. This procedure was, of course, held unconstitutional *without recourse to harmless error rules.*

In the late California decision *Donald Berger* v. *California*, January 13, 1969, —— U.S. ——, —— L.Ed.2d ——, —— S.Ct. ——, No. 218, Misc. Oct. Term 1968, this Honorable Court gave the mandates of *Barber* v. *Page, supra*, total retroactivity, citing with approval again its reasoning in *Bruton* v. *United States* (1968), 391 U.S. 123, and *Roberts* v. *Russell*, 392 U.S. 293. The Court stated:

"Per Curiam.

Petitioner was convicted of robbery and kidnapping for the purpose of robbery. The victim, one Carl Arthur Dunston, testified against petitioner at a preliminary hearing; there was evidence that at the time of the trial Dunston was in Colorado. A state investigator tried to contact Dunston on the telephone; he got through to some of Dunston's relatives and to his employer, but not to Dunston himself. Although two telegrams were received, allegedly from Dunston, no subpoena was served. At trial, the transcript of Dunston's preliminary hearing testimony was introduced into evidence. On appeal, the Court of Appeal for the Second Appellate District of California held that this procedure did not deny petitioner his Sixth Amendment right to be confronted with the witnesses against him since Dunston was absent from the State of his own free will and since petitioner's counsel had had an adequate opportunity to cross-examine Dunston at the preliminary hearing. —— Cal.App.2d ——, 66 Cal. Rptr. 213 (1968). The California Supreme Court

denied petitioner a hearing on April 4, 1968. Nineteen days later we held in the case of *Barber* v. *Page*, 390 U.S. 719, that the absence of a witness from the jurisdiction would not justify the use at trial of preliminary hearing testimony unless the State had made a good-faith effort to secure the witness' presence. The sole question in this case is whether the holding of *Barber* v. *Page* should be given retroactive application. We think that it should.

Clearly, petitioner's inability to cross-examine Dunston at trial may have had a significant effect on the 'integrity of the fact-finding process.' Linkletter v. *Walker*, 381 U.S. 618, 639 (1965); cf. *Roberts* v. *Russell*, 392 U.S. 293 (1968); *McConnell* v. *Rhay*, 393 U.S. —— (1968). As we pointed out in *Barber* v. *Page*, one of important objects of the right of confrontation was to guarantee that the fact-finder had an adequate opportunity to assess the credibility of witnesses. 390 U.S., at 721. And California's claim of a significant countervailing interest based upon its reliance on previous standards, see *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967), is most unpersuasive. *Barber* v. *Page* was clearly foreshadowed, if not preordained, by this Court's decision in *Pointer* v. *Texas*, 380 U.S. 400 (1965), which was handed down more than a year before petitioner's trial. Accordingly, we can see no reason why *Barber* v. *Page* should not be given fully retroactive application.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeal is vacated and the case is remanded for reconsideration in light of this Court's decision in *Barber* v. *Page*, 390 U.S. 719 (1968).

It is so ordered."

It is axiomatic that this Honorable Court will not here in the instant case reverse those well reasoned decisions, indeed, will likely not even consider doing so; the retroactivity matter and issue is truly moot.

Conclusions

For all and each of the foregoing reasons, arguments, and authorities, *supra,* in the instant reply brief, as well as the similar matters in petitioner's opening brief, petitioner Glenn Martin Harrington prayerfully and respectfully petitions this Honorable Supreme Court of the United States of America to reverse his conviction; to delineate and make exceedingly clear on a national basis the exact mandates of *Bruton* v. *United States* (1968), 391 U.S. 123, and *Roberts* v. *Russell,* 392 U.S. 293; to reverse this conviction without recourse to any harmless error rule, and to decree that such shall be the nation-wide consequence of this decision and opinion; to summarily reverse without further remand to lower courts for further considerations, and for such other and further relief as to this Honorable Court may seem just.

Respectfully, prayerfully, and humbly submitted at Woodland Hills, in the State of California.

Roger S. Hanson
Member of the Bar
Supreme Courts of California,
Illinois, Michigan and Iowa.

Attorney for Petitioner,
Glenn Martin Harrington

SUPREME COURT OF THE UNITED STATES

No. 750.—October Term, 1968.

Glenn Martin Harrington, Petitioner, *v.* State of California.	On Writ of Certiorari to the Court of Appeal of California, Second Appellate District.

[June 2, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

We held in *Chapman* v. *California*, 386 U. S. 18, that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." We said that although "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" (*id.*, at —), not all "trial errors which violate the Constitution automatically call for reversal." *Ibid.*

The question whether the alleged error in the present case was "harmless" under the rule of *Chapman* arose in a state trial for attempted robbery and first degree murder. Four men were tried together—Harrington, a Caucasian, and Bosby, Rhone, and Cooper, Negroes—over an objection by Harrington that his trial should be severed. Each of his three codefendants confessed and their confessions were introduced at the trial with limiting instructions that the jury was to consider each confession only against the confessor. Rhone took the stand and Harrington's counsel cross-examined him. The other two did not take the stand.[1]

[1] All four were found to have participated in an attempted robbery in the course of which a store employee was killed. Each was found guilty of felony murder and sentenced to life imprisonment.

In *Bruton* v. *United States*, 391 U. S. 123, a confession of a codefendant who did not take the stand was used against Bruton in a federal prosecution. We held that Bruton had been denied his rights under the Confrontation Clause of the Sixth Amendment. Since the Confrontation Clause is applicable as well in state trials by reason of the Due Process Clause of the Fourteenth Amendment (*Pointer* v. *Texas*, 380 U. S. 400), the rule of *Bruton* applies here.

The California Court of Appeals affirmed the convictions, 256 Cal. App. 2d 209, 64 Cal. Rptr. 159, and the Supreme Court denied a petition for hearing. We granted the petition for certiorari to consider whether the violation of *Bruton* was on these special facts harmless error under *Chapman*.

Petitioner made statements which fell short of a confession but which placed him at the scene of the crime. He admitted that Bosby was the trigger man, that he fled with the other three, and that after the murder he dyed his hair black and shaved off a moustach. Several eyewitnesses placed petitioner at the scene of the crime. But two of them had previously told the police that "four Negroes committed the crime." Rhone's confession, however, placed Harrington inside the store with a gun at the time of the attempted robbery and murder.

Cooper's confession did not refer to Harrington by name. He referred to the fourth man as "the White boy" or "this White guy." And he described him by age, height, and weight.

Bosby's confession likewise did not mention Harrington by name but referred to him as a blond-headed fellow or "the White guy" or "the Patty."

Both Cooper and Bosby said in their confessions that they did not see "the White guy" with a gun, which is at variance with the testimony of the prosecution witnesses.

Petitioner argues that it is irrelevant that he was not named in Cooper's and Bosby's confessions, that reference to "the White guy" made it as clear as pointing and shouting that the person referred to was the white man in the dock with the three Negroes. We make the same assumption. But we conclude that on these special facts the lack of opportunity to cross-examine Cooper and Bosby constituted harmless error under the rule of *Chapman*.

Rhone, whom Harrington cross-examined, placed him in the store with a gun at the time of the murder. Harrington himself agreed he was there. Others testified he had a gun and was an active participant. Cooper and Bosby did not put a gun in his hands when he denied it.[2] They did place him at the scene of the crime. But others, including Harrington himself, did the same. Their evidence, supplied through their confessions, was of course cumulative. But apart from them the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopt the minority view in *Chapman* (386 U. S. 42–45) that a departure from constitutional procedures should result in an automatic reversal, no matter the weight of the evidence.

It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the prob-

[2] "All persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design." *California* v. *Washington*, 62 Cal. 2d 777, 781–782, 44 Cal. Rptr. 442, 445 (1966).

able impact of the two confessions on the minds of an average jury. We admonished in *Chapman*, 386 U. S., at 23, against giving too much emphasis to "overwhelming evidence" of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless. By that test we cannot impute reversible weight to the other two confessions.

We do not depart from *Chapman;* nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 750.—October Term, 1968.

Glenn Martin Harrington, Petitioner, *v.* State of California.	On Writ of Certiorari to the Court of Appeal of California, Second Appellate District.

[June 2, 1969.]

Mr. Justice Brennan, with whom The Chief Justice and Mr. Justice Marshall join, dissenting.

The Court today overrules *Chapman* v. *California*, 386 U. S. 18 (1967), the very case it purports to apply. Far more fundamentally, it severely undermines many of the Court's most significant decisions in the area of criminal procedure.

In *Chapman*, we recognized that "harmless-error rules can work very unfair and mischievous results" unless they are narrowly circumscribed. *Id.*, at 22. We emphasized that "[a]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to the litigant cannot . . . be conceived of as harmless." *Id.*, at 23–24. Thus, placing the burden of proof on the beneficiary of the error, we held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, at 24. And, we left no doubt that for an error to be "harmless" it must have made *no* contribution to a criminal conviction. *Id.*, at 26.

Chapman, then, meant no compromise with the proposition that a conviction cannot constitutionally be based to any extent on constitutional error. The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided "overwhelming" support for

the conviction puts aside the firm resolve of *Chapman* and makes that compromise. As a result, the deterrent effect of such cases as *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Griffin* v. *California*, 380 U. S. 609 (1965); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *United States v. Wade*, 388 U. S. 218 (1967); and *Bruton* v. *United States*, 391 U. S. 123 (1968), on the actions of both police and prosecutors, not to speak of trial courts, will be significantly undermined.

The Court holds that constitutional error in the trial of a criminal offense may be held harmless if there is "overwhelming" untainted evidence to support the conviction. This approach, however, was expressly rejected in *Chapman, supra*, at 23, and with good reason. For, where the inquiry concerns the extent of accumulation of untainted evidence rather than the impact of tainted evidence on the jury's decision, convictions resulting from constitutional error may be insulated from attack. By its nature, the issue of substantiality of evidence admits of only the most limited kind of appellate review. Thus, the Court's rule will often effectively leave the vindication of constitutional rights solely in the hands of trial judges. If, instead, the task of appellate courts is to appraise the impact of tainted evidence on a jury's decision, as *Chapman* required, these courts will be better able to protect against deprivations of constitutional rights of criminal defendants. The focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the amount of untainted evidence.

The instant case illustrates well the difference in application between the approach adopted by the Court today and the approach set down in *Chapman*. At issue is the evidence going to Harrington's participation in the crime of attempted robbery not the evidence going to his presence at the scene of the crime. Without the ad-

mittedly unconstitutional evidence against Harrington provided by the confessions of codefendants Bosby and Cooper, the prosecutor's proof of Harrington's participation in the crime consisted of the testimony of two victims of the attempted robbery and of codefendant Rhone. The testimony of the victims was weakened by the fact that they had earlier told the police that all the participants in the attempted robbery were Negroes. Rhone's testimony against Harrington was self-serving in certain aspects. At the time of his arrest, Rhone was found in possession of a gun. On the stand, he explained that he was given the gun by Harrington after the attempted robbery, and that Harrington had carried the gun during the commission of the robbery. Thus, although there was more than ample evidence to establish Harrington's participation in the attempted robbery, a jury might still have concluded that the case was not proved beyond a reasonable doubt. The confessions of the other two codefendants implicating Harrington in the crime were less self-serving and might well have tipped the balance in the jurors' minds in favor of conviction. Certainly, the State has not carried its burden of demonstrating beyond a reasonable doubt that these two confessions did not contribute to Harrington's conviction.

There should be no need to remind this Court that the appellate role in applying standards of sufficiency or substantiality of evidence is extremely limited. To apply such standards as threshhold requirements to the raising of constitutional challenges to criminal convictions is to shield from attack errors of a most fundamental nature and thus to deprive many defendants of basic constitutional rights. I respectfully dissent.